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New Home of the Supreme Court

In marble halls of spotless white is now housed the highest American Tribunal

BY MEREDITH MARSHALL

THE new home of the Supreme Court on Capitol Hill in Washington is fashioned, like Justice itself, for the ages. The sands of a thousand years may stream through the glass and still the chaste white structure will stand and serve.

Here in marble halls of spotless white is housed the highest American tribunal. For the first time it is domiciled in the impressive dignity and simplicity of its traditions. For more than 145 years—almost a century and a half—the High Court had held session in quarters, cramped and inadequate, assigned it begrudgingly by its jealous peer in government, the Congress. That chapter now ends.

The rooms where it met were often the cast-off quarters of House, Senate, or their employees. Since 1860 it held session in the outworn Senate Chamber of the Capitol. Last summer it moved away from the hall where Webster thundered and John Randolph of Roanoke was wont to lead his hound dog down the aisle to his seat; rumbled across the east plaza of the Capitol to the magnificent edifice planned by Chief Justice Taft and completed under the eye of Taft's successor, Charles Evans Hughes.

IT is at home now forever, after many removals from pillar to post. The court's first session was held February 1, 1790, in the Royal Exchange at the foot of Broad street, New York city. The next year, it met at Philadelphia's new city hall,

just east of Independence Hall on the Square. From 1801 to 1808, it met in the Marshal's office, and in 1809 and for two years thereafter, in the Clerk's Office at the Capitol. Upon the beginning of "Mr. Madison's War," in 1812 and thereafter until the Redcoats burned the Capitol, in 1814, its meeting place was the Capitol's Law Library.

After the Capitol was destroyed, and through 1816, the court held sessions at 204 and 206 Pennsylvania avenue, southeast. During the following two years, it used such temporary quarters as it could obtain in the North Wing of the Capitol. In 1819, it returned for a stay of forty-one years to the present Capitol Law Library. And in 1860, when the Senate occupied the present North Wing, the court was relegated to the inadequate chamber previously occupied by the Upper House.

Twice thereafter, fire drove the court from its quarters: in 1908 to the offices of the Senate District Committee for one week; and in 1901, for about a month, in the rooms of the Senate Judiciary Committee.

THE new building is Corinthian in style and marble throughout. It is not dwarfed by the towering dome of the Capitol nearby nor by the mammoth Library of Congress to the south. Designed in scale to afford dignity and importance in relation to the other buildings on the Hill, it occupies a great square of land gently sloping on all sides to the street from the center, where the building rises. The structure itself extends 385 feet east and west and 304 feet north and south. It is four stories high, measured from the terrace on the east front; three stories from the terrace on the west front. Adjacent wings are three stories in height.

One enters the building from its west front (which faces the east front of the Capitol) across a marble plaza extending to the street, and by easy, low-pitched marble steps leading to the fluted columns of the west portico. In the pediment over those columns one sees in living stone Robert Aitken's sculptured group depicting Liberty Enthroned. This majestic bit of art—one of many—is the first striking adornment to arrest attention and bring to the visitor realization that he is about to enter portals opening upon hallowed ground.

Liberty is seated, looking serenely as if to the coming years, across her lap the scales of Justice, between two guardian figures. On her right, active and alert, scanning the Future as if seeking menace to the figure enthroned, stands symbolic Authority, armed cap-a-pie, sword in hand. To Liberty's left, stands Order, with Roman fasces, in watchful restraint, ready to enforce the dictates of Justice. To the right and left of these guardians are other figures, each representing Council; at their feet lie Research, Past and Present. An English Crown, a Pope's Miter, a Bishop's Crosier, Roman Scrolls, Mosaic Tables are within their reach.

ON the north and south buttresses, abutting the spacious marble steps to the portico, are placed two sculptural groups by James Earle Fraser. Man and woman, respectively, the central figures of these groups, are symbolical of the Guardian of Law

The Impressive Court Room

"THE Supreme Court room is placed at the east end of the main hall on the east and west axis of the building, on the main floor, its location emphasizing that it is the main element of the building. We enter, to view a chamber of impressive proportions and monumental style. It is nearly square, measuring 82 by 91 feet. Without a supporting column to mar the effect of its magnificent proportions, the ceiling towers 44 feet above the floor."

and the Contemplation of Justice.

The east portico is no less impressive. Whereas the sculpture on the western pediment views the future, that on the east portico contemplates the past. Moses, Confucius, and Solon, representing the three great civilizations of ancient times, form the central group of the eastern pediment. Flanking this group to the left, is a symbolic figure bearing the means of enforcing the law. To the right is a group, allegorically treated, tempering Justice with Mercy. Other figures symbolize the settlement of controversy through law, and maritime and other functions of the Supreme Court. Still other symbolic figures are placed left and right, with the fable of the Tortoise and the Hare as the finale.

Hermon A. MacNeil, noted sculptor, wrought that grouping.

BUT we are not yet within the building. The great door through which we pass, and its frame, are of ornamental bronze, richly embellished. The door itself consists of two sliding leaves, each with four panels. Probably no other public building in the nation has so exquisite a portal. Each of the four panels is cunningly wrought to tell a story linked to the majesty of the law:

The Shield of Achilles, to show the origin of law and custom.

The Praetor Publishing His Edict, to signify the authority of the court in the early days of civilization.

Julian and His Pupils, to represent the development of law by scholar and study.

Justinian, the great Roman Emperor, publishing the Corpus Juris.

King John of England, signing Magna Carta.

The Chancellor Publishing the Statute of Westminster in the Presence of Edward I, the greatest single legal reform, perhaps, in mankind's history.

King James I Barred by Coke from Sitting as a Judge, thereby establishing the independence of the court of Executive Authority.

Chief Justice John Marshall delivering his greatest decision, Marbury *v.* Madison.

Upon these panels well might rest the gaze of leaders of the two other

coördinate Departments of Government, Legislative and Executive. Modeled by John Donnelly, Jr., of New York, and in high relief, the figures tell their stories with far greater emphasis than any words here written can convey.

We have passed now across the balustraded plaza, flanked north and south by fountains and flagpoles, through the colonnaded portico and the bronzed doors, to the entrance hall; thence we enter the main hall, which is on a monumental scale. Vermont marble forms the outer facing of the west wall; we now stand in halls lined with Alabama marble, processed in Tennessee, flanked on the ends and sides with monolithic Alabama marble columns, and finished with an ornamental, decorated plaster ceiling.

We are about to enter the inner sanctum—the Supreme Court room itself.

This Inner Temple of Justice provoked more thought and pains in its planning than all the rest of the impressive structure combined. The first impulsive wish of all the Justices and of everyone else engaged in planning the building was that the new court room should resemble closely the old, in which the final word of law and equity had been spoken for three quarters of a century. But careful analysis revealed its shortcomings—it was far too small, to begin—so after mature study it was decided to make appropriate modifications. Different in dimensions and form, the new Supreme Court room preserves, however, the architectural tradition and style of the old.

Before the plans were drawn, the architects studied and analyzed the rooms of every state supreme court in the United States. It was with those rooms well in mind, too, that the present room was designed.

The Supreme Court room is placed at the east end of the main hall on the east and west axis of the building, on the main floor, its location emphasizing that it is the main element of the building. We enter, to view a chamber of impressive proportions and monumental style. It is nearly square, measuring 82 by 91 feet. Without a supporting column to mar the effect of its magnificent proportions, the ceiling towers 44 feet above the floor.

Sixty per cent larger than the old Supreme Court room in the Capitol, the new room is lighted by windows on two sides, opening north and south between colonnades to courtyards where fountains play, and, of course, by artificial light as well. Facing, as we enter, is the dais whereon the nine Justices have their chairs, and the Bench. The walls are finished with Ivory Vein, or Spanish, marble; the columns at the side with light Siena Old Convent, or Italian, marble; the base and floor border are of Levanto marble, also Italian. Between the marble borders, the floor is carpeted.

On the four walls of the attic or clerestory of the room are extensive carved marble panels, modeled by Adolph A. Weinman, sculptor. Impressive, indeed, are these friezes.

On the west wall the dominant motif of the frieze is a group of which Justice, resting on a sheathed sword, is central. A winged figure,

symbolizing Divine Inspiration, balances the scales, flanked by seated figures of Truth and Wisdom. To the right of this central group are other figures, writhing in the coils of a mammoth serpent. These, symbolizing the Powers of Evil, represent Corruption and Slander, and Deceit and Despotic Power.

OUR eyes turn to the left. Here they rest on another group, serene and placid. The sculptor has symbolized here the Powers of Good. One sees the figures: Peace, Charity, Harmony, Security, and Defense of Virtue.

We turn to face the east wall. Two powerful male figures of heroic mien dominate this frieze. Seated, they portray the Power of Government and Majesty of the Law. To their left and right, respectively, are the genii of Wisdom and Justice. Flanking groups symbolize the Safeguard of the People's Rights and the Defense of Human Rights.

Friezes on the north and south walls represent a march of the Great Lawgivers of History, terminating at each end of each frieze in an allegorical group.

In the south wall frieze are represented the great King Menes, who united and ruled Upper and Lower Egypt nearly 6,000 years ago; Hammurabi, King of Babylon, whose reign occurred about 2500 B. C.; Moses, Solomon, Lycurgus, Solon, Draco, Confucius, and Octavian. They move toward the east. The allegorical groups at the ends of the frieze typify History and Fame. A winged figure, standing at left, with fasces, symbolizes Authority; another, at right, with lamp, guards the Light of Wisdom.

On the north wall, the frieze portrays heroic figures of Justinian, Mohammed, Charlemagne, King John, Saint Louis, Hugo Grotius, Blackstone, Marshall, and Napoleon. These also move toward the east. Allegorical groups at the ends of the frieze typify Philosophy, and Liberty and Peace. A winged figure standing at right, with the disc of the flaming sun, symbolizes the Right of Man. Another, at left, with scales, symbolizes Equity.

IN this impressive environment will the nine Masters of the Law lay down the final word for the generations and the centuries yet to come. Crises confronting the Nation, no more to be visioned now than were the present troublous days to be envisaged by the forefathers, will be decided within these ample walls, and no man may gainsay the verdict.

All that we may view after leaving

¶ "THE *new building is Corinthian in style and marble throughout. It is not dwarfed by the towering dome of the Capitol near-by nor by the mammoth Library of Congress to the south. Designed in scale to afford dignity and importance in relation to the other buildings on the Hill, it occupies a great square of land gently sloping on all sides to the street from the center, where the building rises.*"

this Chamber will be in anticlimax. The commodious quarters of the Justices, the ingenious corridor arrangement to insure them privacy when walking from one Justice's room to another's, the inclined driveways to the basement enabling any Justice to step from his car to a waiting elevator and attain his quarters in privacy, the three commodious library quarters, the dining room, the offices of the clerk and other attendants—these and many other features worthy of admiration now appear commonplace. We have seen the Inner Temple.

We pass out to the street and the winter sunlight brings us back to perspective. We learn from David Linn, architect of the Capitol who has been zealously supervising the slowly rising edifice since it first took definite plan in 1929, that quite a practical accomplishment attended its construction: it was built within the limit of the $9,740,000 appropriated for the purpose by Congress. More than that: that sum covered also the cost of its furniture and furnishings. Still more: a part of this money has been unspent and will be turned back to the taxpayers.

And that is something to ponder.

As we linger at the flagpoles, to view the Scales and Sword, the Book, the Mask and Torch, and the Pen and Mace on their bases, we think, too, of the architect, Cass Gilbert, who saw the magnificent structure first of all, and patiently put his dream on prosaic blue prints and into commonplace specifications. He is dead now, but two associates lived to see his greatest structure accomplished—his son, Cass Gilbert, Jr., and John R. Rockart of New York.

One last look at the discs above the swag reveals the heads of an eagle, a fish, a lion, and a tripod of flame. And they, we learn, are symbolic of air, water, earth, and fire, the elements of old.

The New Deal "Regrets" Loss to Utility Investors

"THE losses of innocent investors in securities of certain inflated holding and other companies are regrettable and the administration has instituted remedies designed to prevent a repetition of the unsound, and often fraudulent, financing which has been the primary cause of such losses. These measures, while helpful to present and future investors, cannot rectify abuses of the past, and investors should not be misled as to the cause of their losses by the propaganda of some of those largely responsible for this condition."

—G. W. LINEWEAVER,
Secretary, Federal Power Commission.

Our Streamlined Constitution

Said by the author to be the most discussed and least read essay in existence

By DUDLEY CAMMETT LUNT

HAVE *you* ever read the Constitution?

Who ever reads it? Indubitably it would be conceded the Pulitzer prize as the most discussed and least read essay in existence. And apparently on the score that nearly a century and a half has passed since Gouverneur Morris wrote out the final draft, it is assumed that it must be in all respects a musty old eighteenth century document. Witness the recent controversy between the two worthy defenders of different faiths who illumined their remarks, the one with references to a horse and buggy and the other to an ox-cart.

Now assuredly in approaching the question whether this venerable ark partakes of the nature of a stage coach or whether it has been sufficiently streamlined to meet the modern consumer demand, one's first step should be to examine the instrument itself. There is no occasion for alarm. That celebrated commentator James Bryce once read it and reported his reading time to be but twenty minutes. In other words it is certainly no longer than this magazine article.

The first thing you strike is the preamble, so called. Here it is:

> We the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

IN an age devoted to its wise-cracks, its slogans and abbreviations, and other such facile purveyors of human thought, is not this a pretty succinct statement? Can you today within the confines of 52 words restate the who, the what, and the why of the government of these United States? It is not the substance but rather their form which gives to these words their tincture of antiquity. It is the sonorous cadence of those successive phrases—in order to form a more perfect Union, establish justice, insure domestic tranquillity. . . . In the code of the stylist this is a fair example of the balanced sentence so

characteristic of eighteenth century prose.

Once past the preamble, which your lawyer will assure you grants no powers but is merely declarative of the purpose of the document, immediately you get right down to brass tacks—"All legislative powers shall be vested in a Congress. . . ." Thereafter you encounter the executive and the judicial powers and by the time you have concluded the seventh article, you will have read, exclusive of the titles, just over 4,000 words, 4,059 to be exact. As a matter of fact you could have omitted a fifth of your stint and still have read the document as it stands today.

WHY is this? Because upwards of seven hundred and fifty of the words of those gentlemen who are referred to by the sentimental as "the fathers," have no more bearing, legal or otherwise, upon your life and mine than if they were the utterances of Confucius or Mahomet or let us say, Hitler. Take the seventh article which, since it is the last sentence you perused, you should recall states that upon the ratification of the conventions of nine states the Constitution would be established between them. It is apparent that when the ninth convention voted at Exeter, New Hampshire, on June 21, 1788, to ratify, that sentence had in that instant performed its function. In the fantastic vocabulary of the law there has been assigned to such a condition a phrase suggestive of suicide—self-execution. And the self-executed provisions of this instrument total 300 words.

Again there is the obvious result of that perennially popular sport known as amending the Constitution. The attempted proposals to date exceed three thousand. By this method 456 of the words of "the fathers" have been entirely superseded. For instance the Constitution says that a citizen of Idaho or of Paraguay may sue the sovereign state of New York in the Supreme Court. But the Eleventh Amendment announces that this is out.

THE score now stands at 3,303 words. That is the present-day size of the original ark of the covenant, horse and buggy, ox-cart, or what have you. But on this subject of amendments one must not forget that they too are "valid to all intents and purposes, as part of this Constitution, when ratified. . . ."

Thus to be precise what we have is a Constitution composed of twenty-eight articles of which the first seven comprise the original document and the remaining twenty-one are articles of amendment. And when we delete the self-executed portions of these amendments and in passing shed a tear over the remains of the late Eighteenth, we discover that there has been added to the original instrument more than half again as much new verbiage. Final score stands at 5,195 words. On the physical side the Constitution certainly cannot be said to be the same old grey mare it once was.

Nevertheless before it can be appropriately named Pegasus an examination of the nature of these alterations is in order.

NOW in order to secure to posterity, which is to say ourselves, the blessing so ponderously recited in the preamble "the fathers" did two

Columbus Evening Dispatch

THOSE "DAYS OF THE HORSE AND BUGGY"

things. They at once created on parchment a frame of government and to that government they gave certain powers. With respect to the government, as every school boy knows, they divided it like Gaul into three parts—legislative, executive, and judicial.

Today not a single one of these departments exists as it was originally conceived. Take the Congress. A Senator used to be chosen by the state legislature. Today by virtue of the Seventeenth Amendment he is the voters' choice. And whoever the voters may have been in 1789 colored people and the women folk did not join them at the polls. There you have the result of the Fifteenth and Nineteenth Amendments. Nor does the Congress meet when it did in the olden times and the terms of both Senators and Representatives under-

went a change not so long ago when the Twentieth Amendment was adopted.

WHAT about the President? Had you voted in the first three Presidential elections, which in itself is a large assumption in view of the property qualifications which existed at that time, your choice would not have included a Vice President by name. Under the old rules he was the runner up. The Twelfth Amendment changed all that and incidentally put the office of Vice President on its current Alexander Throttlebottom basis. Here again you meet the Twentieth Amendment. Suppose it had been President-elect Roosevelt instead of Mayor Cermak who had stopped Zingara's bullet. The country would have been in a bad jam but for the adoption of this amendment just prior to that event. It provided for that and similar contingencies in the succession to the Presidency. The lack of provision for such events are referred to by the learned as *lacunae* or a *casus omissus.* Suffice it to say that this amendment plugged some bad holes.

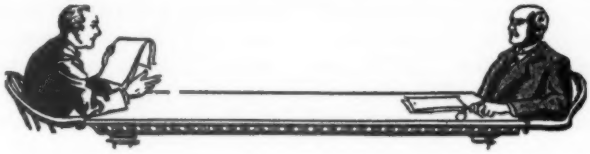
There remain the judges. On the face of it their selection appears to be the same—appointed by the President and confirmed by the Senate. But when you add up the cumulative effect of the altered character of the Senate and the broader vote which underlies the Chief Executive as well, the proposition has lost much of the *haut ton* which was so dear to the true-hearted Federalists.

And remember too that their powers underwent a subtraction with the Twelfth Amendment.

SINCE 1789 the steady accretion of power to the government has manifestly been enormous. Does it come as a surprise to realize that the paradoxical result of the bulk of the formal alterations which concern the powers of the government, has been to restrict them? Take the first ten which constitute John Citizen's Bill of Rights. Each and every one of them applies the brakes to the Federal government. Then we have the Civil War Amendments, the Thirteenth, Fourteenth, and Fifteenth, and to these for good measure may be added the Nineteenth. They put the brakes on both the Federal and state governments and in so doing secure an enlargement of the rights and privileges of John Citizen, his wife, and his daughters.

On the other hand there is the Sixteenth which permits Uncle Sam's tax collector to gather in a portion of your income. Then there was the good old Eighteenth which by a vast grant of concurrent power confounded all theory and practice and resulted in the establishment of an even vaster illicit liquor traffic. Nor did the Twenty-first, in repealing it, entirely restore the *status quo ante.* Here within two years time the commerce clause which is the bone of present contention, underwent a substantial modification in so far as intoxicating liquors are concerned.

AN insistence upon the antique aspect of the handiwork of the Federal Convention tends to obscure the existence of certain portions of it which have lain almost dormant since 1789 and which contain enormous potentialities for the future. As an



Public Opinion As to Government's Power

"IN the last analysis it is public opinion in this country which delimits the power of government and ultimately controls the manner of its exercise. In one guise or another this issue will be with us so long as the American temperament retains its quaint quixotic and contradictory qualities."

instance there is the so-called compact clause which has recently begun to come to the attention of the public. This means agreements between states with the assent of Congress. Within the limits of the agreement a group of states become sovereign again. Take the conditions which surrounded the now famous chicken case or the current attempts by the state of New York to regulate the market for milk, which were in part nullified by the Supreme Court last winter, and figure out the result for yourself.

In the same line there is the language permitting the joining of two or more states. This has never been utilized other than with respect to grants of minor importance, albeit two states, Maine and West Virginia, have been carved out of the territory of Massachusetts and Virginia. It may well be that sectional solidarity will one day overcome local and somewhat sentimental attachment to a separatist régime. The adoption of the much discussed constitutional amendment abolishing the tax-exempt features of government securities might well result in the liquidation of some of the sovereign sisters along this line.

So much for the formal alterations of this venerable document. They have been considerable and they have worked vast changes in our political life. But they tell less than half the tale. Ours is the fifth generation which has functioned under this Constitution. And most assuredly one does not view so fundamental a proposition as the fundamental law from the same angle or with the same eyes as did one's great-great-grandfather. The current changes here are subtle. In the process they are glimpsed but imperfectly by the most penetrative of observers and reveal themselves in their entirety only in retrospect. For example, the law reports in the early days of the Republic are filled with opinions on prize law. Many of these decisions arose under the Federal power to grant letters of marque and reprisal. Today privateering is an obsolete form of war-

fare and such a case has not arisen for generations.

The most potent agency of change is that which parades under the euphemistic term of construction. Although not so popular a form of sport as amending the Constitution, construing its language has from the outset been at once the delight or the bane (dependent upon whose point of view ultimately prevailed) of those who impelled usually by necessity delight to perform that function. And heaven knows there is plenty of room for construction.

THE reason is this. In the first place it took the boys who foregathered at the Federal convention all of one long hot Philadelphia summer to iron out their differences. The compromises which they worked out are so involved that it takes the combination of an historian, an economist, a sociologist, and a practical politician thoroughly to understand them. It is impossible to restate them in language that would hold one's interest. For instance their chief difficulty lay in the alignment which sprang up between the delegates from the large states as contrasted with those from the smaller states. The convention all but broke up on this one. As finally adjusted the working arrangement contained more than half a dozen separate points in satisfaction of this, that, and the other group's desires.

Again there were eleven schemes mooted before the method of electing the President was worked out. The mechanics devised never functioned as intended and they survived in their original form but fifteen years. The result is that definitely conflicting theories of government were embodied in the document and the text was stated in the most general of terms. Thus when the future disputes began each side could call on the gods with equal authority for its position.

IT is a mistake to assume that all of these disputes are settled by the nine gentlemen who are described in the definition given in *Boners* as "a Chief and eight sociable justic." Here is an instance. Once upon a time an extra government got going in Rhode Island. It's an old Rhode Island custom. According to the press no one quite knew recently just who were the judges or why in that state. Well, each crowd, the old and the new, insisted that it constituted the government of Rhode Island and after an amount of complicated maneuvering a case involving this issue reached the Supreme Court. That body sat on this case in emphatic fashion. Nobody heard from them for four years. Then, long after the local warfare in Rhode Island had subsided, the court announced that it was not going to handle this sort of political dynamite. It was up to Congress to decide whether or not a state had the republican form of government guaranteed by the Constitution and further it was the President's job to enforce that guaranty.

NEVERTHELESS within their domain the nine Justices are the lords of the demesne. Here again the definition given in *Boners* is all sufficient. It concludes with the statement that—"what they say, goes." Thus when the nine of them conclude after hearing argument of counsel on the nature and character of chicken

killing in Brooklyn, that this activity is not interstate commerce, that would seem to be that. Now the question is, do you meet the issue presented by this decision by tossing out hyperboles with reference to a horse and buggy or by an attempt at greater historical accuracy with the senatorial pointer aimed at an allegorical ox-cart.

As a matter of fact this issue is much older than the Constitution. There was a time in this country when it was stated in terms of the Crown's prerogative in the colonies. How far could he go? Immediately the Constitution was adopted it arose in the form of whether the new government had only the powers expressly set forth in that document or whether it drew to itself powers by implication. This question is settled. The new government won, thanks to the efforts of Alexander Hamilton and the perspicacity of John Marshall.

THE self-same issue is to be seen again in the now dead dispute as to internal improvements. Presidents, curious as it may now seem, have been known to veto such bills upon constitutional grounds. Again the dispute ultimately resolved itself in favor of the national government. The net result was the famous pork barrel and its modern descendant, the public works program. Then there arose the same issue in the guise of whether the whole was greater than its parts, a question settled some time since at Appomattox.

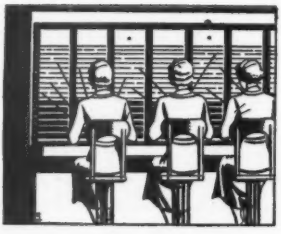
The significant thing about this issue is that irrespective of its form, respectable authority was and is to be found for both sides of the particular question. Each side might go to the ark of the covenant and insist upon its construction as the word of "the fathers." This often results in quaint juxtapositions. Thus the learned Senator who referred to the ox-cart holds up his hands in horror at the extension of the current construction of the commerce clause, yet his support of the Eighteenth Amendment has never faltered. So likewise among the quite recent speeches of the author of the horse and buggy phrase, may be found a spirited defense of what is termed for want of a better name, states' rights. Such duality of position has its seamy aspect. Witness a certain type of industrialist who preached Federal power when he wanted his laborers sober and, in the next breath, preached against Federal power when he wanted them young.

THE truth of the matter is that when the discussion of this issue is carried on in terms of let us now say with greater historical accuracy, Conestoga wagons, the public is led astray. To charge one's successful opponent in litigation with reaction, is the despairing wail of the disappointed litigant. Such an argument de-

¶ "SINCE *1789 the steady accretion of power to the government has manifestly been enormous. Does it come as a surprise to realize that the paradoxical result of the bulk of the formal alterations* [*of the Constitution*] *which concern the powers of the government, has been to restrict them?*"

serves the stamp of what it is—special pleading.

In the last analysis it is public opinion in this country which delimits the power of government and ultimately controls the manner of its exercise. In one guise or another this issue will be with us so long as the American temperament retains its quaint quixotic and contradictory qualities. Just so long, in other words, as we want our cake and to eat it as well. From this angle the contrasted views as to the extent of Federal power to be found in the grant "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes," are the reflection of the seething of current, or shall we say, streamlined popular thought.



Uncle Sam As a Telephone Subscriber

STATISTICS *of the Chesapeake & Potomac Telephone Company, which serves the District of Columbia, as recently reported by* THE WASHINGTON DAILY NEWS, *reveal some interesting facts about the Federal government as a telephone subscriber. Including the field service, Uncle Sam is probably the biggest single telephone subscriber in the world, both in the number of phones and the number of calls per phone. Here are some of the figures for Washington, D. C.:*

(1) There are 32,000 telephones in the government service.

(2) Approximately one out of every six telephones in the city of Washington is in government service.

(3) There is a government phone for every three government workers in Washington.

(4) The government has no central bureau to manage its phone service. Each department and bureau is a separate subscriber.

(5) The Department of Commerce, for example, has 2,600 phones—all reached through the same number and all billed on one bill.

(6) The telephone company sends out 1,200 bills, however, to cover all 32,000 phones.

(7) There are 161 switchboards in the government service—some of them bigger than small city exchanges.

(8) The government gets no discount but pays the same rate (about 2½ cents a call) as any other business subscriber.

(9) The government's phone service has doubled in five years.

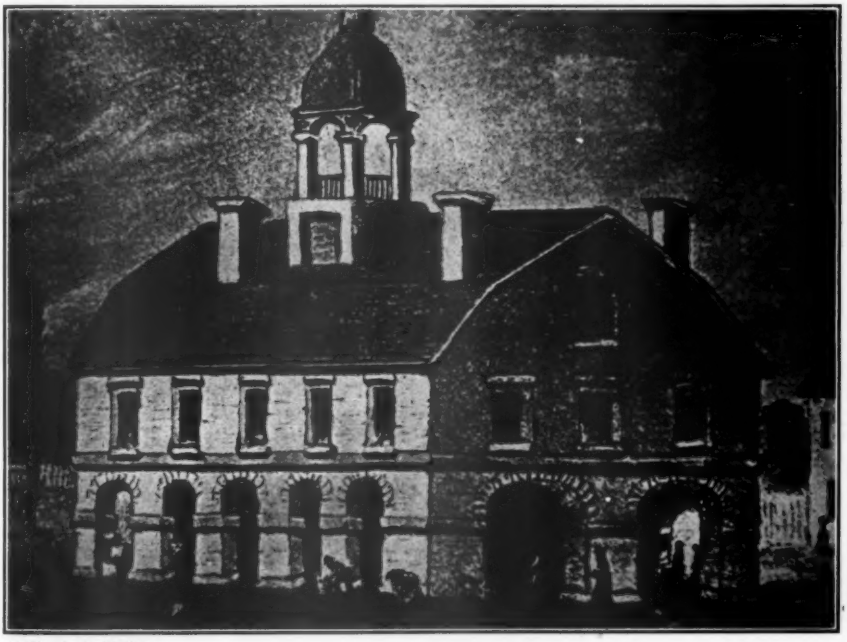
(10) Hoover was the first President ever to have a telephone on his desk. His predecessors didn't like the idea.

(11) The government does quite a bit of talking across the Atlantic, but neither the company nor the State Department will tell how much.

The United States Supreme Court and Its New Temple

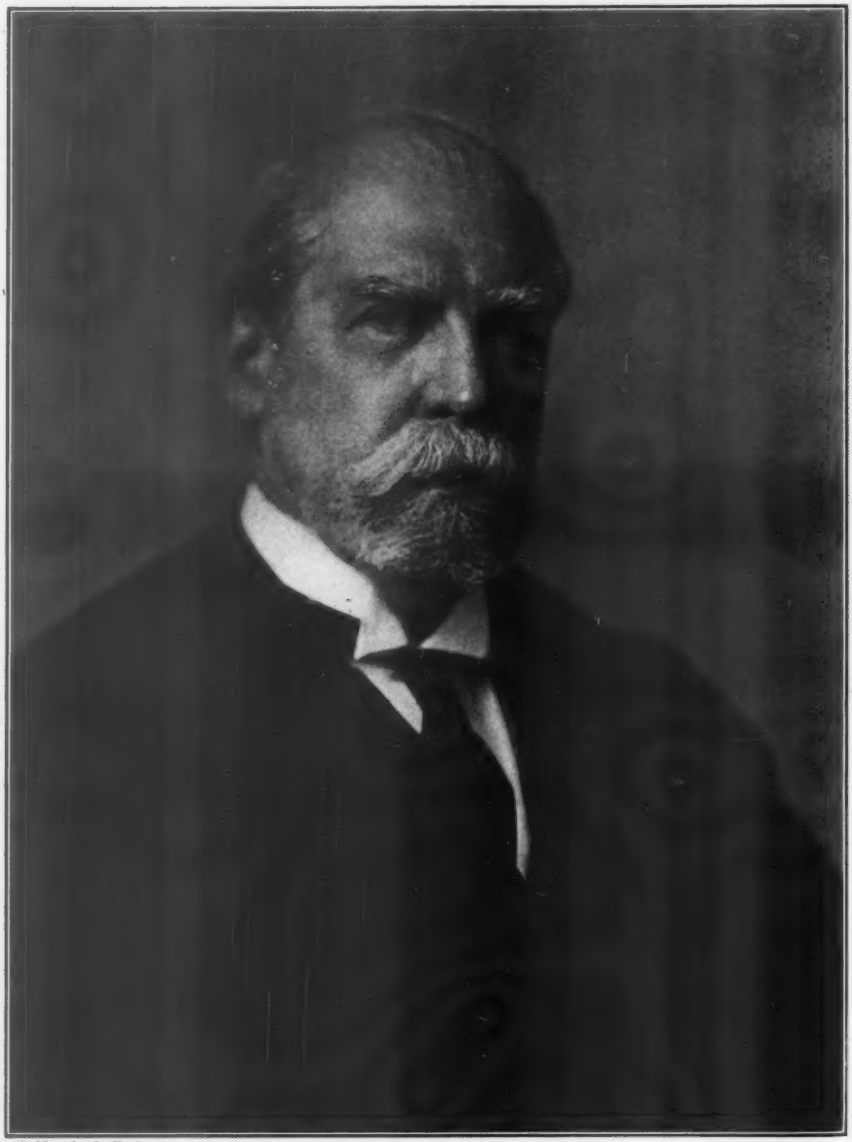
The highest representative of the judicial branch of the Federal government upon which rests the solemn responsibility of interpreting law and safeguarding the rights of the people.

This is the tenth of a series of pictorial supplements of PUBLIC UTILITIES FORTNIGHTLY. *It portrays the nine justices, and the former as well as the present home of the court.*



The First Court, 1790

In this humble building—the old Royal Exchange—located at the foot of Broad street in New York city, John Jay, the first Chief Justice of the Supreme Court of the United States, convened the first session of the highest tribunal of law and equity on Monday, February 1, 1790



Chief Justice Charles Evans Hughes

The eleventh Chief Justice of the highest court
Former associate justice. Former governor of New York.

AGE, SEVENTY-THREE. APPOINTED FEBUARY 3, 1930

Justice Willis Van Devanter

Former Chief Justice of the Supreme Court of Wyoming.
Senior member of the present court

AGE, SEVENTY-SIX. APPOINTED DECEMBER 16, 1910

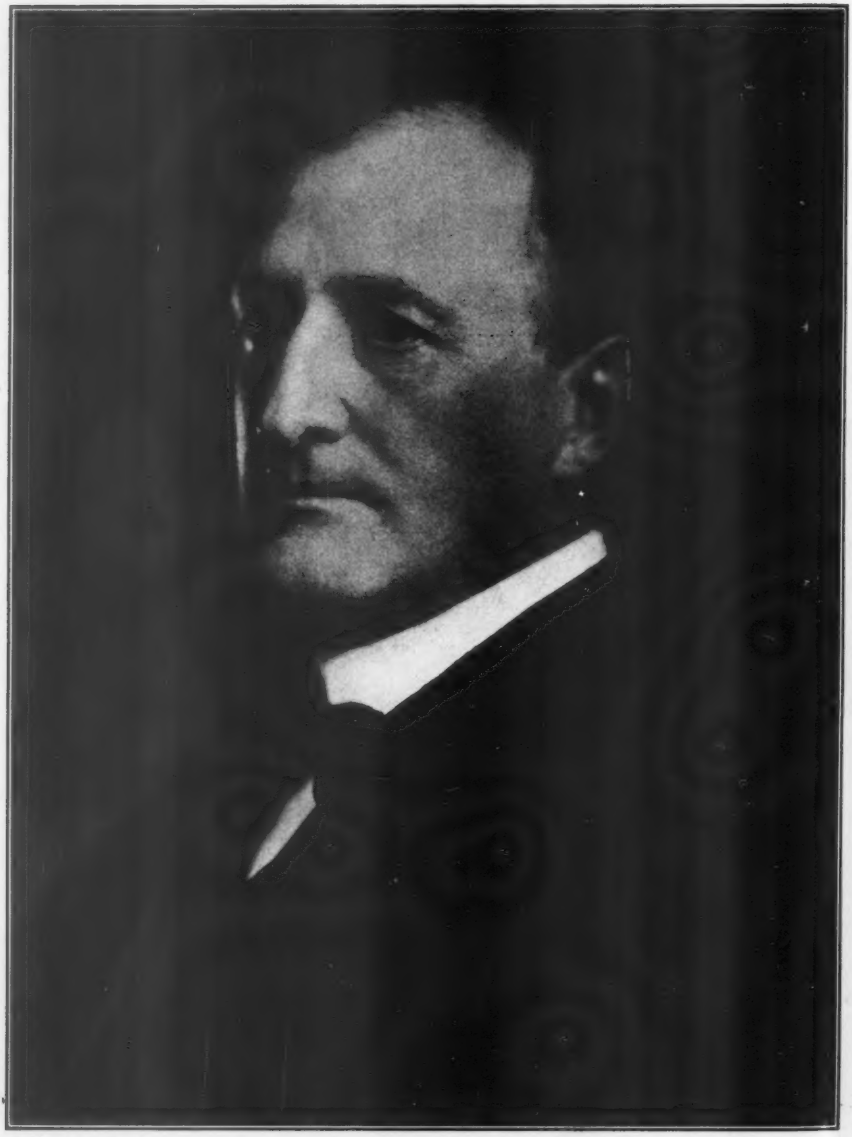
Commercial Photo Co.

Temple of Equity

Exterior front view of the recently completed white marble palace ***that houses the world's most powerful judiciary***

The New Court Room

The destiny of our Constitution and the future of our country will probably be decided in great measure in this chamber of simple grandeur



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Justice James Clark McReynolds

Former Attorney General of the United States under the late President Woodrow Wilson. First practiced in Tennessee

AGE, SEVENTY-THREE. APPOINTED AUGUST 29, 1914

Louis D. Brandeis

Former nationally known trial counsel of Boston, Mass.

AGE, SEVENTY-NINE. APPOINTED JUNE 1, 1916

The Old Court Room

Situated under the dome of the Capitol building, this modest but impressive court room was, until the beginning of the current year, the scene of some of the most memorable decisions in the history of our country

© Harris & Ewing

Where the Court Really Decides Its Cases

This is the main conference room in the new Supreme Court building, wherein the Justices deliberate and exchange views before handing down their final decisions

Justice George Sutherland

The only foreign born member of the court. Born in Buckinghamshire, England, March 25, 1862. Formerly United States Senator from Utah

APPOINTED SEPTEMBER 18, 1922

Justice Pierce Butler

Former nationally known corporation lawyer of St. Paul, Minn.

AGE, SIXTY-NINE. APPOINTED DECEMBER 21, 1922

Justice Harlan Fiske Stone

Former dean of Columbia University School of Law. Former Attorney General of the United States

AGE, SIXTY-THREE. APPOINTED FEBRUARY 5, 1925

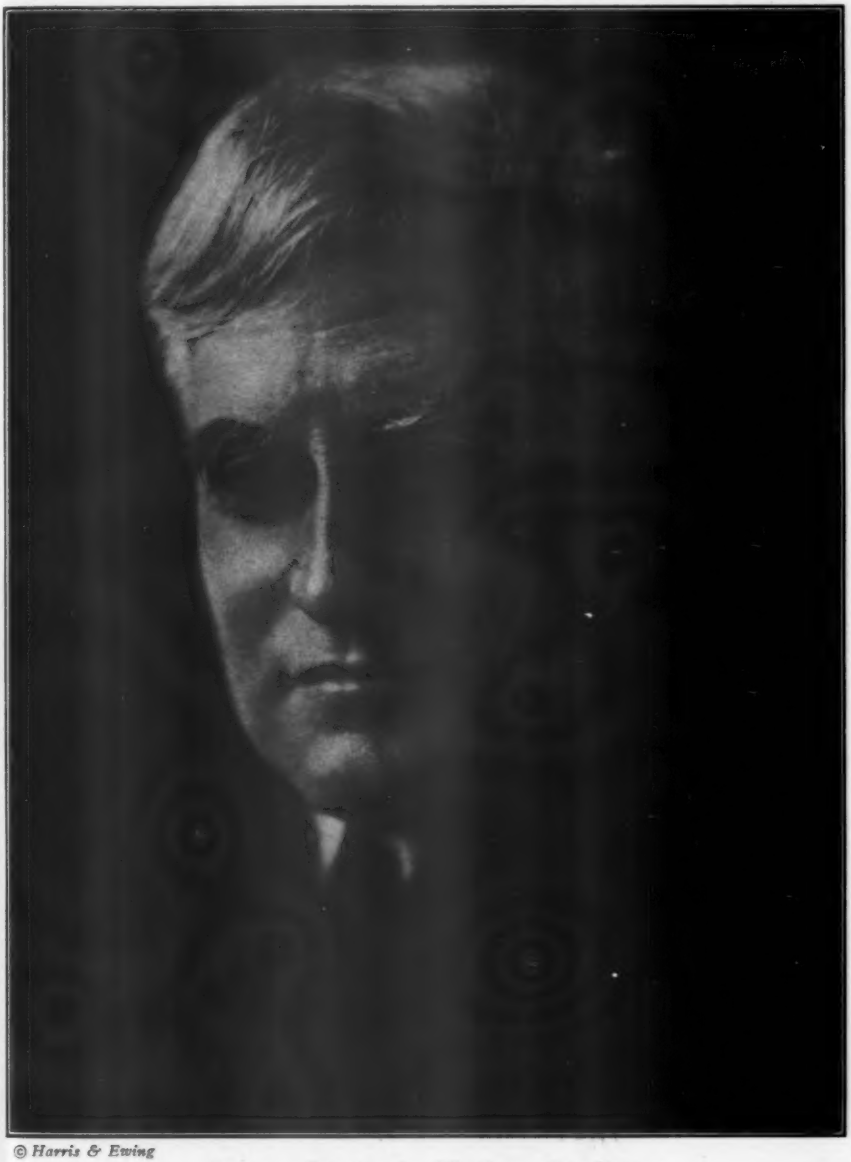
The Shrine of Justice

One of the numerous breath-taking interior views in the new Supreme Court building. The plain Grecian beauty of this foyer fittingly honors the immortal Lincoln's Gettysburg address

Justice Owen Josephus Roberts

Former nationally known attorney of Philadelphia, Pa. Government prosecutor in the notorious Teapot Dome oil cases

AGE, SIXTY. APPOINTED MAY 9, 1930



Justice Benjamin Nathan Cardozo

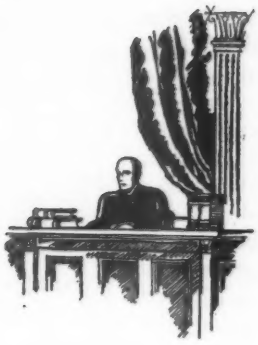
Former chief justice of the New York Court of Appeals

AGE, SIXTY-FIVE. APPOINTED FEBRUARY 15, 1932

© Harris & Ewing

Storehouse of Wisdom

The palatial main reading room of the new Supreme Court library, used principally by attorneys. The Justices have their own library quarters



The palatial main reading room of the new Supreme Court library, used principally by attorneys. The Justices have their own library quarters

Our Supreme Court Justices

Brief sketches of the careers of the nine men to whom is intrusted the highest judicial power in the land

By WILLIAM P. HELM

Charles Evans Hughes

CHIEF Justice of the United States, not only occupies the highest judicial office of the land, but is probably the best known by the public of all of the justices of the Supreme Court, because of his long, varied, and outstanding public service. His first introduction to the public was as counsel for the legislature in the New York insurance investigation more than thirty years ago. That frontal assault on a particular questionable privilege was successful and the public whose rights he championed caught him up and put him in the governor's chair at Albany.

There he cleaned house. A few years later, in 1910, he reached the pinnacle of his aspirations when President Taft appointed him an Associate Justice of the Supreme Court. Although an able and successful lawyer with a highly remunerative practice, Mr. Hughes coveted that honor. He came to Washington and donned the ermine, wanting nothing more. And yet—

"I am happy here," he told his secretary on the afternoon of June 9, 1916. "I have the life work of my choice before me. I do not seek the Presidency. Yet if I am nominated tomorrow, I shall make the sacrifice and accept."

Nominated on the morrow he was, indeed, and promptly he forsook the cloistered court. The sacrifice he made in resigning his office was genuine. The world thought he pined for the Republican nomination, but the world did not know him. He did not relish the return to the rough and tumble of a hot political campaign.

He accepted the nomination because he was convinced he might give greater service to the nation.

UNSWAYED by political expediency, he championed his convictions throughout the campaign. When the Adamson law was rammed through Congress by powerful railroad unions as the price of averting a nation-wide strike, Mr. Hughes denounced it. It would have been politics—he needed those votes—to have approved it.

Defeated at the polls, he retired to private law practice. But not for long. The Democrats drafted him in 1918 to investigate the aircraft situation. The roll of his public honors was longer after than before his defeat. It included the Secretaryship of State which he graced as few predecessors.

On February 3, 1930, President Hoover nominated him to be Chief Justice. Ten days later the Senate confirmed him and on February 24th, he took his seat again on the bench of the highest court of the land.

On that day he took an oath to uphold the Constitution of the United States. He had taken that same oath nearly fifty years before, as a briefless New York barrister in 1884. Many a time during the half century had he taken it again in the course of his public life. It was old and familiar.

The Chief Justice is classed as one of the court's Liberals, but those who know him know that he has not changed, save as passing years mellow men. They know expediency and public favor count as little now against his firm convictions as they did in the olden days. They know that he always has been liberal.

Owen Josephus Roberts

To follow the sketch of the Chief Justice with an outline of the life of one of the court's youngest members, and the next to the last one to be appointed, may be akin to *lese majeste* in the view of the bench, where precedence and seniority rule, but it seems warranted here in view of the extraordinary part Mr. Justice Roberts has played recently in the court's divisions.

Owen J. Roberts may be called aptly the pendulum of the Supreme Court. As he swings, so goes the time of day and so goes the court. His seems to be the balance of power between the four so-called Conservatives—Justices Van Devanter, McReynolds, Butler, and Sutherland—and the four so-called Liberals, Chief Justice Hughes, and Justices Brandeis, Stone, and Cardozo. Justice Roberts plays ball, in popular jargon, with both groups. And a study of the record indicates strongly that in nearly all, if not all, of the recent 5 to 4 decisions, it has been the vote of Justice Roberts that decided the issue.

A Pennsylvanian, born sixty years ago last May, Justice Roberts was identified during much of his brilliant career as a lawyer with solid and substantial corporation interests. This he diversified during twenty years (1898–1918) of his active life as fellow, instructor, assistant professor, and professor of law at the University of Pennsylvania, from which he had been graduated, a Phi Beta Kappa man, with honors in 1895. In 1901, three years after he hung out his shingle, he became first assistant district attorney of Philadelphia county. For nearly

thirty years he continued the practice of law.

During those years he acquired many honorary college degrees; was named trustee of Jefferson Medical College; and served on directorates of the Equitable Life Assurance Society, Franklin Fire Insurance Company, Real Estate-Land Title and Trust Company, American Telephone and Telegraph Company, and other large corporations.

IN the World War his growing reputation for legal ability resulted in his appointment by President Woodrow Wilson as Special Deputy Attorney General of the United States. As such, he was intrusted with the task of cleaning up the nests of spies and near-spies in the Philadelphia section. This assignment, welcomed with gusto, was performed with neatness and dispatch; Philadelphia became as barren of spies as an egg is barren of hair.

His next big undertaking was an assignment by Calvin Coolidge. When Mr. Coolidge was President, it will be recalled, the scandal of Teapot Dome erupted, and Cabinet members fell as fast as whole European Cabinets fall today. The President decided to intrust prosecution of the cases to a bipartisan pair of renowned lawyers. He picked Atlee Pomerene of Ohio as the Democrat but had some difficulty in finding the right Republican. A close personal friend of the President suggested Owen J. Roberts.

Mr. Roberts was appointed soon thereafter. He stuck patiently and tirelessly to the involved and intricate assignment that finally sent Albert Fall to the penitentiary. President Hoover appointed him to the Supreme Court May 9, 1930, and he took office within a month thereafter.

Willis Van Devanter

MR. Justice Van Devanter became a Federal judge by appointment of Theodore Roosevelt thirty-two years ago—back in 1903, when President Franklin D. Roosevelt was playing college pranks at Harvard. Seven years later, President Taft, who had broken with Theodore Roosevelt in the meantime, put the stamp of his approval on the latter's choice by elevating Justice Van Devanter from a circuit judgeship to the Supreme Court bench.

At that time, Mr. Justice Van Devanter was nearing his fifty-first birthday. He has served twenty-five years, and at seventy-six is second only in years to Mr. Justice Brandeis. In service on the Supreme Court bench, however, Justice Van Devanter outranks all his colleagues.

By virtue of seniority, Mr. Justice Van Devanter sits on the right hand of the Chief Justice, who occupies the central chair, when court is in session. He is closer to the Chief Justice physically, in some of the court's decisions, than in any other way, perhaps. For while Chief Justice Hughes is classed generally as a Liberal in his views, Mr. Justice Van Devanter ranks, in the bar's general appraisal, as the most conservative of the Conservative group.

This trend was exemplified half a century ago when young Van Devanter moved from his native Indiana to Wyoming, then considered ultra wild and woolly. He anchored at Chey-

enne. Oldtimers there still tell tall tales of the Van Devanter prowess in organizing the local Vigilantes and thwarting the Bad Men of the frontier. Rustling cattle was a favorite pastime of the section, but Van Devanter and his subordinates stepped so hard on this form of outlawry that it wasn't long before the jails were filled and the business ended.

THAT, quite naturally, attracted attention. The late Republican Senator Francis D. Warren was a power then in the political affairs of Wyoming Territory and through Warren's favor, President Harrison appointed the young Vigilante leader chief justice of the territorial supreme court. He was continued by election in this office, but resigned it to make a living, so he said, and went back to his law practice.

He liked politics, however, and dabbled locally in Republican councils. In 1897, Senator Warren again urged him to reënter upon the national stage, a step which resulted in President McKinley's appointing him Assistant Attorney General of the United States in that year. Assigned to the Department of the Interior, Mr. Van Devanter devoted himself to the duties of his office for six years until President Roosevelt, finding him a man after his own heart, named him to the circuit bench for the eighth district.

James Clark McReynolds

SECOND in years of service on the Supreme Court bench, Mr. Justice McReynolds occupies the chair at the left hand of the Chief Justice, thus placing the Liberal Chief Justice between two of the court's outstanding Conservatives.

Justice McReynolds, solemn, ponderous, and serious—it is said Washington hostesses have never known him to crack a joke—is the bachelor member of the court. Having attained maturity and the prime of life without marriage, it is related of him that he has confided to intimates he sees no reason why he should relinquish his single blessedness. He is now in his seventy-fourth year.

A native of Kentucky, Justice McReynolds migrated to Tennessee for his education, graduating at Vanderbilt University in 1882, and later took his law course at the University of Virginia. He returned to Tennessee and began the practice of law at Nashville, where he won recognition as an able advocate with especial strength in presenting a case to a jury.

It was under a Republican President, Theodore Roosevelt, that Mr. McReynolds, a Democrat, first held Federal office; and Mr. Roosevelt appointed him despite his politics and because of his fearlessness and legal skill. The office Mr. McReynolds entered upon, at forty-one years of age, was that of Assistant Attorney General of the United States. He held it four years, until 1907, when he resigned and moved to New York to practice law.

THERE, through Colonel Edward M. House, Mr. McReynolds met Woodrow Wilson, and when Mr. Wilson took office as President, Mr. McReynolds went back to the Department of Justice at Washington. This time it was not as assistant but as Attorney General of the United States.

There he became the central figure of a controversy in the celebrated Diggs-Caminetti Case involving the application of the Federal white slave law. Attorney General McReynolds held the view that the law was written to prevent the extension of commercialized vice and for no other purpose. He found himself in disagreement with others who would have utilized the law for the prosecution of cases where the element of commercialized vice was lacking. But his view prevailed and the controversy died down.

His administration as Attorney General was unmarked by any other unusual development. A vacancy occurring in the Supreme Court, President Wilson nominated him for the office August 29, 1914, and he took his seat October 12th of that year.

Louis Dembitz Brandeis

VETERAN, in age, of the Supreme Court, Mr. Justice Brandeis is, perhaps, its most colorful member despite the handicap of seventy-nine years. Now in his eightieth year—his birthday was November 13th—this advanced Liberal daily takes an active part, second, indeed, only to that of the Chief Justice, in interrogating—and often confusing—the lawyers appearing before him. A few pregnant questions from Justice Brandeis usually dissipate irrelevancies and often bring smiles to court and counsel.

Mr. Justice Brandeis was a stormy petrel before he slipped into the ermine. Born in Louisville, the son of a cultured Bohemian Jew who had emigrated to America, Louis Brandeis is best known as a New Englander. He was educated in Louisville and in Europe but came back to Harvard to study law. He studied it so well that the rules of the school were suspended to permit him to graduate when he was but twenty years of age.

He went to St. Louis to begin his career, but Missouri did not take kindly to him; so within a year he was back in Boston. Back Bay welcomed him; he became a social favorite. His practice grew almost magically and his local fame as an advocate and winner of causes was secure within two years.

But presently he was assailing in the public courts the vested interests of New England on behalf of the class he thought down-trodden and exploited. Society chilled; but to his door came a host of new friends—in overalls, with grease-stained hands, without funds—to seek in his brilliant services the justice too costly for them to win elsewhere.

LOUIS Brandeis took many of those pitiful cases without cost to his clients. He became known as the people's counsel; his services were for the asking where poverty barred employment. Moreover he had the temerity to attack the most impeccable of New England's institutions—the New Haven railroad. That heresy won him the hatred of many fair-weather friends.

But he attained local reputation as a radical. President Woodrow Wilson appraised his great ability and high character and thought the Supreme Court needed him. President Wilson sent his nomination to the Senate in January, 1916, and he was confirmed June 1st of that year.

He took his seat on the bench four days later.

George Sutherland

MR. Justice Sutherland is a lawyer's judge. He possesses what is commonly known as the judicial temperament to a marked degree, even among Supreme Court Justices. It is an acquired temperament, however, for George Sutherland was a first-rate politician before he became a jurist and he won his spurs on the hustings in a frontier land. Like many a convert late in life to any cause, Justice Sutherland has embraced the judicial temperament more ardently, perhaps, than he would have embraced it in his earlier days.

Justice Sutherland was born in Buckinghamshire, England, the only Justice not a native American. He returns to Britain often during summer vacations to enjoy life in Scotland. He flocks oftenest, in split decisions, with the Conservatives headed by Mr. Justice Van Devanter.

In 1883, when he was twenty-one years old, Justice Sutherland was admitted to the bar after a law course at the University of Michigan. For thirty-nine years thereafter, until his appointment to the Supreme Court by President Harding in 1922, he mixed law and politics in his career. After receiving his degree, he set out for Utah and opened a law office in Salt Lake City. He was afterward identified prominently with Utah politics.

His first public office was held in his early twenties—senator in the state legislature. Thirty-five years ago he came to Washington as a grass-green member of the Fifty-seventh Congress. One term in the House, with its single-room office space and its rough-and-ready debating tactics, satisfied him; he declined renomination. But he had another idea, even better, and this he went back to Utah to put into execution.

WITH energy and ability and without loss of time, he succeeded in having the Utah legislature elect him Senator. He came back to Washington—to two office rooms and more clerical assistance—in 1905, and promptly decided he wanted a place on the Senate Judiciary Committee, goal of many an able Senator with legal training. He got it.

In the Senate he was quiet but effective. He made few speeches, but when he spoke he said something. Utah sent him to the Senate for a second term and he became chairman of the powerful Judiciary Committee. In 1917, however, he was succeeded as Senator from Utah by William H. King, who still holds that office. Justice Sutherland then was president of the American Bar Association.

In private life again, Justice Sutherland practiced law once more. In 1918 he delivered a series of lectures at Columbia University, published later under the title, Constitutional Power and World Affairs. President Harding appointed him to the court in 1922. During his thirteen years of service he has specialized on constitutional interpretation.

Pierce Butler

OUT in the Land of the Sky Blue Waters where Mr. Justice Pierce Butler first saw daylight, folks

refuse to let him grow up. It is useless to go there and refer to Mister Justice Butler; nobody knows any such person. After a long talk, perhaps, the resident, with a dawning look of comprehension on his face, probably will smile and say, "Oh! You mean Pierce Butler, don't you?"

He is still plain Pierce Butler in Minnesota. Justice Butler is a six-footer, broad-shouldered, sandy-haired now greying fast, with a chain-lightning mind. His opinions lean to conservatism in questions involving the Constitution.

When Pierce Butler was a youngster he got much of his law training on horseback. That was because he had to ride five miles after attending to the farm chores, from his paternal home to Carleton College, daily for his classes. When work there was done, he returned to render maid service to the farm horses and milk the cows. This stiff régime put iron in his blood.

He graduated in 1887 and soon went to St. Paul to practice law. There he remained for thirty-five years, winning local and state laurels, until he took his seat January 2, 1923, as Associate Justice of the Supreme Court. It is said that George W. Wickersham, who had been Mr. Taft's Attorney General, was charmed with Mr. Butler's legal abilities and suggested the appointment to President Harding. Mr. Butler was at one time a law partner of William DeWitt Mitchell, Attorney General under President Hoover.

In Minnesota, Pierce Butler was identified in his private practice largely with the St. Paul, Minneapolis and Omaha Railroad Company. During his long law practice he became well known throughout the Northwest, but his ability and capacity were not generally heard of in the Eastern part of the country.

Hence there was a general expression of Eastern surprise when he was named for the Supreme Court. He takes rank, however, with the abler men who have held the office. He is classed as a Conservative.

Harlan Fiske Stone

Mr. Justice Harlan F. Stone stepped on the national stage amid the reeking aftermath of the Teapot Dome scandals. No one was more surprised when he did so than Harlan F. Stone.

After many days, Harry M. Daugherty finally had left the Cabinet. Calvin Coolidge, new in the Presidency and out to avoid appointment errors of his predecessor, leaned backward in seeking to fill Daugherty's place as Attorney General. Mr. Coolidge wanted, above all, an Attorney General unknown to politicians. He looked long and vainly for an eminent lawyer whose light had been hidden under a bushel—or, at least, under three pecks.

Then, by sudden inspiration, Mr. Coolidge went back to the days of his Alma Mater, Amherst. He recalled a strong, towering figure who had played "center rush" on the football team. It was Stone of '94. Mr. Coolidge was of the class of '95. Stone of '94 thereafter had followed the law with signal success. He then was a member of the outstanding New York firm of Sullivan, Cromwell &

Company. He was the man Mr. Coolidge was looking for.

"I want you," Coolidge told him, "to conduct the office of Attorney General as you would your own private law office, with the public as a client."

That was in April, 1924, and such were the only instructions Mr. Stone received from his chief on taking office. But those he followed religiously. The ways of politics he eschewed as wholly as his predecessor had espoused them. He cleaned house at the Department of Justice and attended solely to his administrative and legal functions.

ONE day, late in the fall of the same year, Chief Justice William Howard Taft hastened to the White House. The aging Joseph McKenna, after twenty-seven years on the Supreme Court bench, had just told the Chief Justice that the weight of years lay too heavily on him to continue his arduous work. It was a court secret; Mr. Taft told the President. The next day Mr. Coolidge summoned Attorney General Stone to the White House.

"The Supreme Court needs you," Mr. Coolidge told his astonished Attorney General. "Will you accept the appointment?"

The response was made public on January 5, 1925. On that day, Mr. Taft announced Justice McKenna's resignation. Mr. Stone was nominated the same day. The Senate confirmed him a month later and he took his seat March 2nd—less than a year after he had been sworn in as Attorney General.

Mr. Justice Stone is one of the court's outstanding Liberals. He was born in New Hampshire sixty-three years ago. In New York city, his long residence, he helped, as Dean of Columbia Law School for many years, mold the mental habits of thousands of young lawyers. His private practice was of the sort that seldom led him to a court room; the kind that called for burning the midnight oil in the seclusion of his law library. It was regarded as highly lucrative. The sacrifice Harlan Stone made in laying it down to enter public life is understood to have been a large one, financially.

Benjamin Nathan Cardozo

DEPTH and originality of thought are outstanding characteristics of the most recent of the Supreme Court Justices to take office, Mr. Justice Cardozo of New York. Like Mr. Brandeis, Mr. Cardozo is a Jew, the son of a Portuguese who settled in New York city where Benjamin was born May 24, 1870.

"The builder of a bridge," he once told the New York County Lawyers' Association, "is not harried by misgivings as to whether the towers and piers and cables will withstand the stress and strain. If his bridge were to fall, he would go down with it in disgrace and ruin. Yet withal he never has a fear. No experiment has he wrought, but a highway to carry men and women from shore to shore; to carry them secure and unafraid.

"So I cry out in rebellion, 'Why cannot I do as much to bridge with my rules of law the torrents of Life?'"

The answer came to him, he con-

tinued: "The law is not an exact science." But it was not a satisfying answer, and the cries "in rebellion"—rebellion against inequity, injustice, the right of might—seem still to surge up from his heart to be seemingly, but not wholly, stifled as they tremble for utterance on his lips. One has but to read his outstanding dissents to hear the echo of those cries.

Justice Benjamin N. Cardozo takes full rank with Justice Brandeis and Chief Justice Hughes in the Liberalism of his philosophy of life. Its perfume lies upon his every decision, blended with practicalities more subtly, perhaps, than in the case of the venerable Justice Brandeis; yet to be mellowed, perhaps, by time to the rare vintage of the older and more ripened views of the Chief Justice. Justice Cardozo is regarded universally by the bar as one of the greatest lawyers not only of the present but of all time; the world seems destined to hear much from him in years to come.

As yet, however, he has but barely been seated on the Supreme bench. He was nominated by President Hoover February 15, 1932. Within nine days the Senate confirmed him unanimously, and he took his seat March 14th.

Back of that day, however, lay eighteen years of service as jurist in New York. It was there Justice Cardozo learned to temper dreams with the practical affairs of life, for the office he first occupied, justice of the state supreme court, is elective: he had to win it at the polls. Within a month of his taking that office, on New Year's Day of 1914, Judge Cardozo was designated by the governor to act as associate justice of the court of appeals. Four years later he was elected to that office; and nine years thereafter he was elected chief judge of that court, an office he resigned to accept the promotion at Washington.

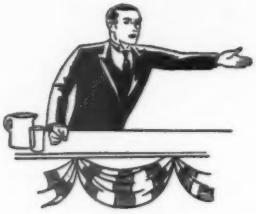
Justice Cardozo is the author of several widely read books, the best known of which, perhaps, is *The Growth of the Law,* a series of Yale University lectures. The quality of his writings is strong of the flavor of that of the late beloved Justice Oliver Wendell Holmes who seems to have influenced Justice Cardozo profoundly. He holds:

"The law must take the form and pressure of the time. It must compromise between the claims of the Past and the needs of the Present."

Junk the Consumer Deposit Rule

"THERE is a serious question about our requiring a deposit in advance to guarantee the payment of domestic gas bills. Preliminary investigation of the cost of handling consumers' deposits indicates that the increased loss, which might be expected if such deposits were waived from domestic consumers, would be only slightly in excess of the cost of this whole deposit business. If it were found practicable to waive the requirements of a deposit from domestic consumers, the gain in public esteem would be great."

—F. S. WADE,
President and General Manager, Southern Counties Gas Company.



Does the Holding Company Law Violate the Constitution?

A glance at Supreme Court decisions

Can Congress with the avowed purpose of regulating the rates and services of operating utilities and the possible sale of some so-called securities, based on fictitious asset values or in anticipation of excessive revenues, asks the author, abolish holding companies, good and bad, and prevent their using the mails or the parcel post service? Can it penalize all holding companies by exorbitant taxes?

By WILLIAM M. WHERRY

It was twenty-five years ago, in the hot debate over a bill to abolish child labor universally in the United States, regardless of differences in local conditions, that Senator Gallinger asked Senator Beveridge his classical question about the red-headed milkmaids.

"Can Congress," asked Senator Gallinger, "prohibit interstate transportation of milk from all cows milked by red-headed girls?"

Senator Beveridge was too good a constitutional historian to answer the question categorically, but continued his graphic depiction of the evils of child labor. He and his fellow reformers painted those evils in unrelieved blackness. They emphasized their prevalence and the interdependence of all citizens of the modern state, regardless of state lines. They conveniently disregarded all mitigating circumstances, all local differences; even the fact that in southern climes the age of puberty is attained much younger than in northern (Alas! Poor Juliet!), and the further fact that the farm might present tasks no more arduous than basket ball, while even a factory could be run in such a way as not to be injurious to young or old.

Reforms are not brought about by balanced reasoning. Their advocacy finally resulted in the passage of the National Child Labor Bill. Once more the Supreme Court was confronted with the questions: "How plenary are the powers of Congress? Is the power to accomplish this or that the power to destroy?"

The evils of child labor were not the only dragons sought to be slain by national legislation in those

far-off days. The hustings resounded with denunciations of the evils of big business, and the earnest advocates of reform proposed to correct those evils by Federal statutes. Congress was to proceed to exercise only well-recognized powers intrusted to it. It was to compel Federal incorporation and to regulate all business activities through the supervision of Federal bureaus—not divinely appointed or inspired, but chosen by politicians and inspired by the desires and motives of ordinary mortals.

The beloved William J. Bryan proposed to force such Federal incorporation by denying to those who refused to reincorporate under the Federal statute the use of the mails, by depriving them of the right to appeal to Federal courts, by prohibiting national banks from accepting deposits from them or loaning money on their stocks or bonds, and by restricting their use of interstate commerce and the postal service. Heavy fines in the form of taxes were also suggested to coerce compliance with this contemplated Federal Incorporation Statute. It will be noted that these proposals all called for the exercise of powers vested by the Constitution in the Federal government—the power to levy taxes, the power to issue coins, the power to regulate foreign and interstate commerce. In every case the question was "Is this power to tax, to issue, to regulate, the power to destroy?"

SENATOR Beveridge might have found a short answer in the writings of his favorite author. His fellow advocates, by misquoting, did so. Their favorite phrase was a paraphrase of what was said in McCulloch *v.* Maryland,[1] "The power to tax," said Marshall, *arguendo,* "involves the power to destroy." And it should also be remembered that in that case, and in using those words, he was explaining the reasons for declaring void a statute which was designed to have that very effect. This statute was not, properly speaking, a tax statute, though cast in that form. It imposed drastic penalties on banks doing business in Maryland, issuing bank notes without the authority of the state of Maryland, and was designed to prevent the branch of the Second Bank of the United States in Baltimore from operating in Maryland at all.

Marshall might have placed his decision on the ground that the state could not destroy under the pretext of taxation. But he did not have to consider whether the tax was a pretext or not. He rested his decision on the broader ground that the state had no power to tax the Federal government, which was, in effect, what it was then attempting.

HIS meaning becomes clearer not only from reading the context, but from reading what he said in the case of Brown *v.* Maryland,[2]

> It is obvious that the same power which imposes a light duty can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised.

and in Gibbons *v.* Ogden,[3] he had said:

> This power (referring to the power to regulate foreign and interstate commerce) like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.

[1] (1819) 4 Wheat. 316.
[2] (1827) 12 Wheat. 419, 439.
[3] (1824) 9 Wheat. 1, 196.

Marshall clearly had in mind the distinction between the exercise of a power for a legitimate object which might have incidentally destructive effects, and the enactment of laws to accomplish objects not intrusted to the government. He recognized that where a law is passed in the exercise of a clear power, the motives will not be inquired into, although the act may be injurious to states or individuals, but he also had a firm conviction that the Supreme Court had power to look behind the mere forms of statutes and deal with their real purposes and effects. This is clear from his own language in McCulloch *v.* Maryland:[4] where he says:

> Should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.

TODAY, it is proposed to cure the evils due to abuses of the holding company device in the public utility field, by compelling or coercing all holding companies in that limited field to submit themselves and the subsidiary operating companies whose securities they hold, to Federal regulation of a sort more drastic than that adopted by most states with respect to operating public utilities.

The statute (Title I of the Public Utility Act of 1935) recently enacted by Congress to regulate or abolish holding companies in the public utility field presents this fundamental question: Is it actually and truly an act to regulate commerce or the post, or to maintain national credit, or to accomplish any object intrusted to the Federal government, or is it, in actual truth, one of those laws condemned by Justice Holmes, in his brilliant dissent in the Northern Securities Co. *v.* United States,[5] the true object of which is to reconstruct society—a power not intrusted by the Constitution to Congress?

THIS statute presents once more the question whether Congress can nullify the rights of the states to regulate business and affairs essentially local in character by the exercise of Federal power over interstate commerce. This statute also presents the question whether securities are articles of commerce and the further question as to whether the business of holding companies and their subsidiaries directly affects interstate commerce.

It also presents the question as to how far Congress can delegate legislative powers, how far it can go in imposing restrictions on court review, to what extent it can impose excessive penalties, for the purpose of coercing compliance with it, and finally the question as to whether the legislation is so arbitrary as to fall within the ban of the Fifth Amendment.

[4] (1819) 4 Wheat. 316, 423.

[5] (1904) 193 U. S. 197.

¶ "THIS *statute presents once more the question whether Congress can nullify the rights of the states to regulate business and affairs essentially local in character by the exercise of Federal power over interstate commerce.*"

One of the important questions is whether the statute is a mere pretext at exercising a legitimate power of Congress for a purpose not intrusted to it.

The Supreme Court is always reluctant to declare a statute of Congress void on this ground, but if it is clearly made manifest to it that such is the true purpose and effect of the statute, the court is bound "should a case requiring such a decision come before it, to say that such an act is not the law of the land."

ALTHOUGH the Northern Securities Case was not decided on that issue and can be distinguished from cases which were so decided, Justice Holmes' dissenting statement in that case of the principle cannot be improved. Mr. Justice Holmes said:

> I am happy to know that only a minority of my brethren adopt an interpretation of the law which, in my opinion, would make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms. If that were its intent I should regard calling such a law a regulation of commerce as a mere pretense. It would be an attempt to reconstruct society. I am not concerned with the wisdom of such an attempt, but I believe that Congress was not intrusted by the Constitution with the power to make it, and I am deeply persuaded that it has not tried.

A leading case, of course, is the Child Labor Case of Hammer *v.* Dagenhart.[6] In that case the Supreme Court in unmistakable language declared a statute unconstitutional because it violated this fundamental principle. The act there in question excluded from commerce all goods manufactured in factories or produced in mines where child labor was employed, and this was held void as an attempt to regulate matters of a local character, under the guise of regulating commerce.

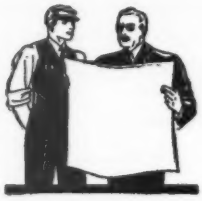
HAD not Congress power over commerce and the mails, and did it not have a right to say what could or could not be carried therein? Had it not been held in earlier cases that Congress could prevent the use of the instrumentalities of commerce and the post office for the transportation of articles used for immoral or illegal purposes? Had it not prevented the transportation of diseased animals, and narcotics? Did it not prevent the use of interstate commerce to further the white slave trade? The cases sustaining such legislation were all urged upon the court, but the distinction seemed plain between a statute which produced a police result under the power to regulate commerce, where the real injury or evil involved was attendant upon the commerce itself, and cases where Congress attempted to prohibit the use of commerce to cure a claimed existing evil which had no relation to interstate commerce.

The lottery ticket statute would be analogous to a holding company statute if it provided that no printer should put in interstate commerce any of his products, even hymn books or Bibles, if his press had once been used in printing lottery tickets.

THE pure food statute would be analogous if it provided that no shipper could ship pure foods if he had ever shipped food which was tainted.

The white slave statute would be analogous if it provided that no person could commute from his home in the suburbs to his regular business if he had once taken his mistress on a

[6] (1918) 247 U. S. 251.



What Is the Real Object of the Law?

"THE statute . . . recently enacted by Congress to regulate or abolish holding companies in the public utility field presents this fundamental question: Is it actually and truly an act to regulate commerce or the post, or to maintain national credit, or to accomplish any object intrusted to the Federal government, or is it, in actual truth, one of those laws . . . the true object of which is to reconstruct society—a power not intrusted by the Constitution to Congress?"

junket across a state line by railroad.

The court, in Hammer *v.* Dagenhart, above referred to, held that the real purpose of the statute was to regulate local manufacturing and mining businesses and to prohibit the local employment of children; that this was beyond the power of Congress and could not be accomplished by preventing those factories from using the instrumentalities of commerce. The mere fact that commerce is utilized, or that an enterprise extends beyond state lines, is not enough.

There are many cases which hold that the opportunity of engaging in commerce is a right, and not a privilege. In the Employers' Liability Cases,[7] the court set aside a statute because it "destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress."

DOES not Federal legislation which arbitrarily deprives citizens of the liberty to trade and the freedom of contract violate the Fifth Amendment, just as similar state laws would violate the Fourteenth Amendment? This would seem to be a truism, since it was first expounded in the Sinking Fund Cases.[8] Every governmental power, in the state or in the Federal government, must be exercised in subordination and subject to the fundamental rights of the people. Arbitrary and unreasonable regulations cannot be tolerated.

This principle has been applied in a myriad of cases, arising under the

[7] (1908) 207 U. S. 463, 502.

[8] (1879) 99 U. S. 700, 727, 762.

Fourteenth Amendment, and also in several arising under the Fifth Amendment. There are, however, cases recognizing an even broader principle, namely, that "there are implied reservations of individual rights without which the social compact could not exist and which are respected by all governments entitled to the name," and holding that regardless of the Fourteenth or the Fifth amendments, confiscatory decrees in legislative form are void, and will not be enforced or recognized by the courts.

THE abuses with which holding companies are charged, are of two classes; first, those relating to the issue of securities, and second, those relating to the expenses and rates of operating companies. As to the first class, it is claimed by Congress: "That such securities are often issued on the bases of fictitious asset values and of paper profits from intercompany transactions and do not accurately reflect the sums invested in underlying public utility properties"; that "such securities are often issued in anticipation of excessive revenues from subsidiaries, which . . . would burden consumers . . . and . . . cause loss to investors who have been led to believe that such revenues are a legitimate part of the issuer's income."

The second group of abuses is based on the relations of holding companies to operating subsidiaries. Undoubtedly, in some instances, contracts with operating companies did result in excessive operating expenses and concealed profits. Abuses of this class are claimed to be as follows: That "subsidiary public utility companies are often subjected to excessive charges for services, construction work, equipment, and materials, to the detriment of investors and consumers."

THE problem of controlling security issues of a holding company does not present questions peculiar only to the public utility field. It is simply part of the wider problem of control of the issue and sale of all corporate securities and the same abuses and dangers arise with respect to the questions of stocks and bonds of all corporations. The Securities Act and the Securities and Exchange Act adequately deal with this situation.

Holding companies met a social need and performed valuable service. The report of the Federal Trade Commission, which pointed out their abuses, also enumerated the services they performed, as follows:

> Funds were obtained from investors, which promoted more rapid extension and improvement for small or undeveloped operating utilities than would have in many cases been possible as independent units; combinations were hastened of smaller utility operations into one or more larger organizations which made possible the advantages of physical interconnection, large-scale production, and unified management; skilled management and expert engineering were concentrated on the problems of construction, production, transmission, distribution, and utilization of electric energy; service was improved and extended, consumption increased, and costs of production were reduced, with a consequent possibility of and tendency toward lower rates, notwithstanding accompanying financial practices which had an opposite tendency as to rates; it was to the interest of the holding company to lower costs as a means of increasing its profits.

THESE social advantages of public utility holding companies demonstrate that the securities of these companies are in no respects similar to

lottery tickets or diseased cattle. There can be no question that a diseased cow could serve no useful purpose. At the time the lottery tickets were excluded from the mails and commerce, there was a well-nigh universal belief that lotteries were immoral. Notwithstanding the preamble to the bill as passed by the Senate, it would be easy to prove that the great bulk of the securities of holding companies are sound investments. The depression of 1929 has abolished the insecure and fraudulent ones, just as the depression of 1873 cured many of the evils complained of in the Grainger movement which formed the bases of the legislation imposing arbitrary restrictions on railroad rates of that day.

Congress might conceivably enact proper legislation for the purpose of preventing fraudulent security issues from being transported, and such statutes might be framed so as to fall within the lottery case and the cases prohibiting the transportation of diseased cows and immoral women. But it is claimed that the laws purporting to regulate or abolish holding companies go far beyond the statutes of this type which have been upheld by the courts.

MINUTE regulation of purely intrastate business or of legitimate business is not justified merely to prevent the transport of doubtful or even fraudulent securities. Because some holding companies have issued securities on the bases of fictitious asset values or of paper profits, or in anticipation of revenues which were unfortunately never realized, there is no justification for abolishing all holding companies, even those whose main business is not commercial but which only use interstate commerce incidentally in their enterprises. Nor would it justify the minute regulation of the other businesses in the case of such holding companies as were actually engaged in interstate commerce.

The business of insurance is not commerce, and has been so held by the courts. A statute which prohibited the transportation of insurance policies, either in the mails or in interstate commerce, unless insurance companies registered their business with a Federal bureau and subjected all of their transactions to government regulation, would be clearly invalid.

Giving exhibition baseball games is not interstate commerce, nor are vaudeville shows. Could a statute be sustained as constitutional which prohibited baseball companies or vaudeville troupes from using the railroads in transportation if they did not submit their exhibitions to government regulations?

THE railroads themselves are undoubtedly instrumentalities of

¶ *"THE lottery ticket statute would be analogous to a holding company statute if it provided that no printer should put in interstate commerce any of his products, even hymn books or Bibles, if his press had once been used in printing lottery tickets."*

commerce and subject to regulation. Yet it has been held that statutes attempting to regulate their businesses, not connected with their interstate commerce activities, are invalid.[9]

In the Taxicab Case the Terminal Taxicab Company was engaged in the business of carrying passengers for hire, pursuant to contracts with hotels and railroad terminals. It also furnished a service from its garage pursuant to private calls. The public utility commission of the District of Columbia attempted to regulate the rates and charges for both classes of service. The Supreme Court of the United States held that as to the business of furnishing carriage between hotels and railroad terminals, the company was a common carrier and subject to the jurisdiction of the commission, but as to the balance of its business it was not a common carrier and that that business was no more subject to regulation by the commission than if it had been conducted by an entirely independent enterprise.

THE attempted regulation must have some relation to the interstate commerce which Congress has power to regulate and the substantial and direct effect on interstate commerce must be shown as a jurisdictional fact.[10]

The latest decision of the United States Supreme Court based on this principle is the Railroad Pension Case (Railroad Retirement Board *v.* Alton R. Co.)[11] In that case, the court reiterated the principle that the power of Congress to regulate interstate commerce must be exercised in subjection to the guaranty of due process of law, under the Fifth Amendment. The court examined the statute providing for pensions for railroad employees, and found therein arbitrary provisions which compelled the carriers to provide pensions for employees who were in no way entitled to such benefits. These provisions, it held to contravene the due process clause of the Fifth Amendment, and since they were inseparable from other provisions which might have been sustained, the entire statute was held invalid. The court, however, went further, and said, page 362:

> We are of opinion that it is also bad for another reason which goes to the heart of the law, even if it could survive the loss of the unconstitutional features which we have discussed. The act is not in purpose or effect a regulation of interstate commerce within the meaning of the Constitution.

IT was conceded that there were many beneficent purposes recited in the preamble of the statute, such as "to provide adequately for the satisfactory retirement of aged employees"; "to make possible greater employment opportunity and more rapid advancement," and "to add to the contentment and feeling of security of the employees." But it was contended that these purposes had no relation to the promotion of efficiency and safety in interstate transportation, and that although the act was called an act to regulate commerce, it

[9] Employers' Liability Cases (1908) 207 U. S. 463; 2nd Case (1912) 223 U. S. 1; Baltimore & O. R. Co. *v.* Interstate Commerce Commission (1911) 221 U. S. 612; Terminal Taxicab Co. *v.* Kutz, 241 U. S. 252, 256, P.U.R.1916D, 972.

[10] Florida *v.* United States (1931) 282 U. S. 194; Producers Transp. Co. v. Railroad Commission (1920) 251 U. S. 228; Tyson & Bro.-United Theatre Ticket Offices *v.* Banton (1927) 273 U. S. 418; Crowell *v.* Benson (1932) 285 U. S. 22.

[11] (1935) 295 U. S. 330.

Security Issue Regulation

"THE problem of controlling security issues of a holding company does not present questions peculiar only to the public utility field. It is simply part of the wider problem of control of the issue and sale of all corporate securities and the same abuses and dangers arise with respect to the questions of stocks and bonds of all corporations. The Securities Act and the Securities and Exchange Act adequately deal with this situation."

was in reality an act to promote the social welfare of the worker, and that this was its real purpose and intent. The court carefully examined these contentions and held as follows (page 368):

> Can it fairly be said that the power of Congress to regulate interstate commerce extends to the proscription of any or all of these things? Is it not apparent that they are really and essentially related solely to the social welfare of the worker, and therefore remote from any regulation of commerce as such? We think the answer is plain. These matters obviously lie outside the orbit of congressional power. The answer of the petitioners is that not all such means of promoting contentment have such a close relation to interstate commerce as pensions. This is in truth no answer, for we must deal with the principle involved, and not the means adopted. If contentment of the employee were an object for the attainment of which the regulatory power could be exerted, the courts could not question the wisdom of methods adopted for its advancement.

And in conclusion the court made this statement (page 374):

> We feel bound to hold that a pension plan thus imposed is in no proper sense a regulation of the activity of interstate transportation. It is an attempt for social ends to impose by sheer fiat noncontractual incidents upon the relation of employer and employee, not as a rule or regulation of commerce and transportation between the states, but as a means of assuring a particular class of employees against old age dependency. This is neither a necessary nor an appropriate rule or regulation affecting the due fulfilment of the railroads' duty to serve the public in interstate transportation.

IT may well be maintained that under this case and analogous cases a Federal statute attempting to deprive holding companies of the privilege of using interstate commerce goes far beyond a proper regulation of interstate commerce, even if confined to those holding companies whose sole business consisted of buying and selling securities in such commerce.

If this is so, it is much clearer that the legislation far exceeds anything hitherto sustained by the courts with respect to those abuses of holding companies which affect the rates and services of operating companies. Conceivably Congress might pass a statute to regulate the transportation of gas or electricity across state lines but the proposed statute is not confined to such regulation. It makes no distinction between intrastate and interstate operating utilities.

There are many cases holding that the generation of electricity and the manufacture and production of gas are intrastate and are within the sole jurisdiction of the states, even though

immediately transmitted across state lines.[12]

THERE are other cases which hold that the local distribution of electricity or gas is intrastate business, solely within the jurisdiction of the states, even though it has been transmitted across state lines from the state of generation or production.[13]

There are a multitude of cases which hold that Congress cannot, under the guise of regulating interstate commerce, control local manufacturing, mining, and agricultural activities, and there is nothing in any of these cases to intimate that a different rule would be applied to the generation of electricity or the manufacture or production of gas.[14]

It would seem that any secretarial, fiscal, engineering, legal or advisory, or similar services, rendered by a holding company to a subsidiary, would be as much intrastate business as the performances given by baseball teams or vaudeville troupes. The mere fact that the holding company used interstate commerce or the mails in facilitating such business would not give Congress power to regulate it.[15]

As was well said by Thomas Cooley:

> Congress is limited to the commercial transaction and to the act of transportation,

and

> It cannot regulate domestic enterprises or those enterprises which only indirectly or incidentally affect commerce.

THE control of commerce and not the control of domestic policies of the several states is what has been intrusted to Congress.

The several states have always had the power to correct the claimed abuses respecting charges by holding companies to operating subsidiaries. This power has been greatly strengthened and clarified by court decision and statute during the past three or four years, but it has always existed.

In testing the reasonableness of a rate, the state may, in a proper case, disallow certain operating expenses in whole or in part. For instance, in Chicago & G. T. R. Co. *v.* Wellman,[16] the court held that the company could be compelled to submit an analysis of its operating expenses so that the court could determine whether they were fair and reasonable in testing the constitutionality of a statutory rate, saying:

> While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call "operating expenses."

THIS statement suggests at once the power and the limitation on the power of the state with respect to contracts. If any contract calls for exorbitant and unreasonable charges,

[12] See Utah Power & Light Co. *v.* Pfost (1932) 286 U. S. 165; Hope Nat. Gas Co. *v.* Hall (1927) 274 U. S. 284, as illustrations.

[13] East Ohio Gas Co. *v.* Tax Commission (1931) 283 U. S. 465; Public Utilities Commission *v.* Landon, 249 U. S. 236, P.U.R. 1919C, 834.

[14] Kidd *v.* Pearson (1888) 128 U. S. 1; United States *v.* E. C. Knight Co. (1895) 156 U. S. 1; Crescent Cotton Oil Co. *v.* Mississippi (1921) 257 U. S. 129; United Leather Workers' International Union *v.* Herkert & M. Trunk Co. (1924) 265 U. S. 457.

[15] Blumenstock Bros. Adv. Agency *v.* Curtis Publishing Co. (1920) 252 U. S. 436; Federal Base Ball Club *v.* National League (1922) 259 U. S. 200; Hart *v.* B. F. Keith Vaudeville Exch. (1923) 262 U. S. 271; Interstate Amusement Co. *v.* Albert (1916) 239 U. S. 560.

[16] (1892) 143 U. S. 339, 346.

then, in fixing a rate, the state may disallow as operating expenses the excessive sums so charged.

On the other hand, so long as the charges are within reasonable limits of ordinary management, the state cannot substitute a lower charge for what was actually incurred.

Many of the recent state statutes have exceeded the line which marks the boundary between management and regulation, but, at least they have all made a plausible pretext of exercising a legitimate power.

So far as the holding company act affects subsidiary and affiliate companies engaged in intrastate commerce, the decision in Schechter Poultry Corp. *v.* United States,[17] will be applicable as a precedent, and holding companies will be able to demonstrate that the great majority of their subsidiaries are engaged in intrastate commerce. The chief constitutional defect in the act is the inclusion of all subsidiary and affiliated companies, regardless of whether such companies are engaged in inter- or intrastate commerce.

IN the Schechter Case, a slaughterhouse operator engaged in the live poultry business in New York had been convicted of violation of a code adopted under the NRA. Although his slaughtering was done in New York city, the poultry was bought in Philadelphia, and shipped direct to his slaughterhouse.

The Supreme Court was not content to rest its decision on the obvious ground that the statute under which these codes were adopted violated the principles governing the delegation of legislative powers. The court first considered whether the transactions were in interstate commerce. The opinion points out that the "mere fact that there may be a constant flow of commodities into a state does not mean that the flow continues after the property has arrived and has become mingled with the mass of property within the state and is there held solely for disposition and use," so that when the slaughtering of the poultry took place the "flow in interstate commerce had ceased."

This puts the Schechter Case on all fours with cases where public utilities bring gas or electricity across state lines for local distribution and cases where they avail themselves of the services of lawyers, accountants, engineers, and other experts who travel from point to point to render local services to operating companies.

HAVING pointed out that the case could be disposed of on the ground that the transactions were not transactions in interstate commerce, the court considered the question whether they could be held directly to affect interstate commerce so as

[17] (1935) 295 U. S. 495.

¶ "BECAUSE *some holding companies have issued securities on the bases of fictitious asset values or of paper profits, or in anticipation of revenues which were unfortunately never realized, there is no justification for abolishing all holding companies. . . .*"

to be subject to Federal regulation.

> The power of Congress extends not only to the regulation of transactions which are part of interstate commerce, but to the protection of that commerce from injury.

This is undoubtedly so, but, on the other hand, unless the transactions threaten injury to commerce Congress has no power over them. In the case before it, the Supreme Court held the transactions had only the most remote and indirect effect on interstate commerce, and, therefore, could not be controlled and regulated by Congress. The case was clearly distinguishable from cases where intrastate operations had such a close and substantial relation to interstate traffic that the control was essential to secure freedom of interstate traffic from interference and to promote the efficiency of interstate service.

It was also clearly distinguishable from combinations and conspiracies to restrain interstate commerce, such as the conspiracies involved in Local 167, International B. of Teamsters *v.* United States,[18] where a conspiracy among teamsters, market men, and slaughterers to prevent the free movement of live poultry in interstate commerce into the metropolitan area in and about New York city was held a conspiracy in violation of the Sherman Anti-Trust Act. The Schechter Case was not of that sort; the court said (page 546):

> If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the state over its domestic concerns would exist only by sufferance of the Federal government. Indeed, on such a theory, even the development of the state's commercial facilities would be subject to Federal control.

And the court further said (page 549):

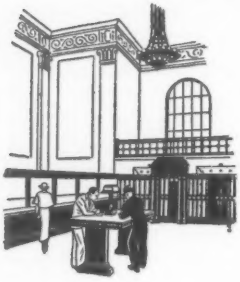
> All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted object of Federal control, the extent of the regulation of cost would be a question of discretion and not of power.
>
> The government also makes the point that efforts to enact state legislation establishing high labor standards have been impeded by the belief that unless similar action is taken generally, commerce will be diverted from the states adopting such standards, and that this fear of diversion has led to demands for Federal legislation on the subject of wages and hours.
>
> The apparent implication is that the Federal authority under the commerce clause should be deemed to extend to the establishment of rules to govern wages and hours in intrastate trade and industry generally throughout the country, thus overriding the authority of the states to deal with domestic problems arising from labor conditions in their internal commerce.
>
> It is not the province of the court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it. Our growth and development have called for wide use of the commerce power of the Federal government in its control over the expanded activities of interstate commerce, and in protecting that commerce from burdens, interferences, and conspiracies to restrain and monopolize it.

This opinion was written by Chief Justice Hughes, who dissented in the Railroad Pension Case, and it was concurred in by all the members of the court, Justice Cardozo writing a separate opinion. No one can read these opinions without being convinced that this case was considered to present a clear example of arbitrary assumption of power on the part of Congress wherein it attempted to deprive the citizen of his liberty under a mere pretext.

It may be conceded that it is within the power of Congress to enact proper

[18] (1934) 291 U. S. 293.

Use of Mails and Interstate Commerce



"It would seem that any secretarial, fiscal, engineering, legal or advisory, or similar services, rendered by a holding company to a subsidiary, would be as much intrastate business as the performances given by baseball teams or vaudeville troupes. The mere fact that the holding company used interstate commerce or the mails in facilitating such business would not give Congress power to regulate it."

statutes to regulate interstate transportation of gas, electricity, and water; to exclude fraudulent securities from the mails or interstate commerce; or to prevent the acts of individuals or states from excluding the interstate shipment of gas, electricity, and water; and that in any such statute or statutes Congress could provide appropriate penalties.

THE question remains: Can Congress, with the avowed purpose of regulating the rates and services of operating utilities, and the possible sale of some so-called securities, based on fictitious asset values or in anticipation of excessive revenues, abolish holding companies, good and bad, and prevent their using the mails or the postal service? Can it penalize all holding companies by exorbitant taxes?

The very heart of the question of constitutionality is the power of Congress to compel a company to give up rights ordinarily enjoyed by every citizen through the device of registration. For this reason, any company that desired to challenge the constitutionality of the act would clearly be at a disadvantage if it registered. Thereafter it could, of course, challenge the act piecemeal by bringing suits to test specific sections thereof before the courts or it could challenge some administrative order under the act as being arbitrary and beyond constitutional limitations. This is the procedure which would be advocated by those who desired the companies to fail in their suits testing the constitutionality of the act. It would also be the procedure which would be advocated by those who would be hopeful of having the act sustained in part even though it might be declared unconstitutional in other parts. It is true that any one company might file with its registration statement a document reserving constitutional rights which would enable it to take advantage of a decision of the Supreme Court of the United States holding the act unconstitutional. But such a company would always be confronted with the problem of bringing itself within the particular facts of the case passed upon by the court. Furthermore, it would be at a great disadvantage if it desired to

challenge the provision of the act making registration compulsory or that provision of the act which makes the mere holding of securities by an unregistered holding company a felony.

For these reasons the major public utility holding companies of the United States have refused to register and have elected to challenge the constitutionality of the Public Utility Act at the very outset.

SINCE this article was prepared, Judge William C. Coleman, in the Federal court, sitting in Baltimore, has advised the trustees of a holding company appointed under § 77-B of the National Bankruptcy Act not to register, and in an exhaustive and very able opinion has held Title I of the act unconstitutional *in toto*.

This was an advisory opinion and the government was not a party to the suit. The government has, however, commenced a suit against the Electric Bond and Share Company, in the southern district of New York, to compel that company to register and has selected that suit as the one which it thinks will be best for the courts to pass upon in considering the constitutionality of that title.

There have been 309 requests for exemption under the provisions of the law and more than 47 suits filed to test the constitutionality of Title I. These suits are pending in New York, Pennsylvania, Maryland, Delaware, Ohio, Minnesota, and the District of Columbia. They present every phase of the Public Utility Holding Company Act to the courts.

Title II of the act, which gives the Federal Power Commission power to regulate interstate operating companies, has not been challenged as yet. The only way in which that section can be challenged will be by an appeal from some order or act of the commission which the company aggrieved claims is arbitrary and unconstitutional.

The American Inventor of Wireless Telegraphy

ACCORDING to Robert L. (Believe-it-or-not) Ripley, Dr. Mahlon Loomis, a Virginia dentist, experimented with two-way wireless communication in the Blue Ridge mountains as early as 1868, which was six years before Guglielmo Marconi, the acknowledged Italian inventor of wireless, was born. He succeeded in sending signals between two mountain peaks 18 miles apart. Unfortunately, the panic of 1869 destroyed financial backing which he had tentatively obtained. Two years later the Chicago fire canceled financial connections he had made in that city. Two years later Congress passed legislation (1873) in his favor but failed to make any appropriation. Before he could overcome these failures death struck the final blow in 1886. Nine years later, says Ripley, "Marconi picked up where Loomis had left off."

Remarkable Remarks

"There never was in the world two opinions alike."
—MONTAIGNE

REPORT
South Dakota State Planning Board.

"Rural electrification development must be undertaken by coöperation with present public utility companies."

HONORABLE HAMILTON FISH
U. S. Representative from President Roosevelt's home district, New York.

"The Passamaquoddy tidal power project at Eastport, Maine, is a typical New Deal project and absolutely insane."

DANIEL C. ROPER
Secretary of Commerce.

"A fair and comprehensive analysis shows that the New Deal program is based upon tried and tested precedents."

LEONARD WARE
Boston correspondent for the New York Times.

"Army engineers . . . are becoming keenly interested in Quoddy and would be disappointed if it were called off."

SENATOR RUSH D. HOLT
In an address to the Indiana Farm Bureau.

"Many government officials are nothing more than puppets of the financial interests that want to make you pay the bill."

JAMES A. FARLEY
United States Postmaster General.

"I do not know whether the devoted men who are handling it (TVA) are members of my party or the other party, nor does it make any difference."

HARPER SIBLEY
President, United States Chamber of Commerce.

"Where would the gas industry be today if government had taken it over thirty years ago? I venture to say that it would be right up front among the 'horse and buggy' enterprises."

JAMES M. LANDIS
Chairman, Securities and Exchange Commission.

"The expense of security registration is undoubtedly a major consideration in the minds of those who are planning to undertake new financing. . . . These expenses have continuously shown a decrease."

CLAUDE L. DRAPER
Member, Federal Power Commission.

"The Public Utility Act of 1935, while perhaps not representing the detailed or final legislative answer to this great problem born of our electrical age, nevertheless contains principles of such constructive merit that that legislation may well become the Magna Carta of the power-consuming public of the United States."

A Plea for Utility Coöperation with the New Deal Legislation

In the opinion of the author an attempt altogether to prevent the Federal government from regulating the utilities will, in the end, make it more difficult for them to get a hearing on points about which they may possibly be right.

By OSMOND K. FRAENKEL

CHANGE—often more apparent than real—is the one accepted truth of life. Yet change is resisted fiercely always. The unwillingness to learn new habits or seek new ways of life typifies in our minds the peasant, the man whom we think of as opposed to progress on account of his ignorance and superstition. But the learned professional man and the otherwise venturesome business man are alike reluctant to abandon many of their accustomed ways.

In the last century doctors fought the introduction of antiseptic methods. There are always lawyers objecting to proposed procedural reforms. With a few notable exceptions English mill owners of the early nineteenth century could see nothing but calamity, not only for themselves but for the whole nation, in proposals to abolish 14-hour labor for women and children.

Step by step American business men have denounced as socialistic measures designed to improve the lot of their workers: laws limiting the hours of labor, laws requiring the use of safety appliances, laws instituting systems of workmen's compensation, laws establishing a minimum wage, laws abolishing child labor.

The banking community tried hard to prevent the passage of the Federal Reserve Act and, more recently, that of the Securities Act. Yet most of these once bitterly contested reforms have proven their usefulness. Often the much-feared change has become a blessing in disguise.

MORE today, perhaps, than ever, hostility to change prevails among business interests. The Wheeler-Rayburn Utilities Act, the Wagner Labor Relations Act, the Guffey Coal Act, the Social Security Act, as well as varied governmental activities in the development of housing and power facilities—all these out-

growths of the depression are being resisted stubbornly. Pending now before the courts there are challenges to the legality of most of these measures or activities.

Why should this be almost invariably the case? Why should established industry oppose its will to the popular will as expressed in governmental action? Is the cause merely the selfishness of individual units bent on retaining for themselves their place in the sun? Is it something more fundamental? A consideration of the circumstances which led to the enactment of the contested measures may throw light on these questions.

They grew, of course, out of the depression. Yet that alone tells us nothing. Volumes have been written to account for this strange, recurring phenomenon. That there should be want in the midst of plenty has been called a paradox. Yet that is not an accurate description of the condition. For it is obvious that neither today nor at any time have we had enough of the good things of life to go round.

OUR American scene is shockingly badly provided with houses, not only in city slum areas but in wide sections of the open country. Only a small proportion of our population is adequately clothed. The paradox is of another kind, that a rapid increase in the supply of things needed by people the world over results utlimately in panic.

There are those who have attempted to avoid the consequences of this seemingly inexorable law by restricting their own production and, of necessity, thereby lowering the standard of living of the rest of the world.

Others have tried to ameliorate the resulting chaos by calling on government to do what industry has been afraid to do—to resume productive activity, and so increase the purchasing power of the consumers.

Still others have sought a lasting answer to the riddle. They believe that recurrent crises are inevitable so long as production is determined by the urge of producers, whether in industry or agriculture, to sell at a profit, since a time will always come when newly increased productive capacity is greater than the ability of the masses to absorb the product. That, unless something is done to prevent it, the familiar pattern of the last six years will repeat itself again and again with perhaps increasing severity, is the almost unanimous opinion of many students of the subject.

THERE are only two ways in which attempts can be made to prevent this recurrence of depression or at least to minimize its disastrous consequences. One is to change the system; the other is to remove the most glaring abuses of the present order. The first way leads to socialism or communism, variants of the same revolutionary principle that the people should own and control the instruments of production and distribution since in no other way will these be used to accomplish the necessary satisfactions and happiness of mankind. The second way is being attempted by the New Deal.

However one may, as critic from the right or the left, object to the present administration, on the ground of its frequent vacillation and ineptitude, it must be admitted that today, for the

first time in a generation, those in power in Washington realize that important problems exist which need to be solved. Critics who object to the New Deal because it bolsters up and thereby prolongs the life of capitalism speak for a somewhat more distant future than need here concern us. But those, on the other hand, who while giving lip service to the need for "constructive" reform still object to every measure actually proposed, are more surely undermining the society they desire to support than are the ardent revolutionaries. For the former, by their actions, prove what the latter claim: that the existing order is unable and unwilling to reform itself.

THOSE who sincerely hope for a continuation of capitalist society are above all the ones who should learn to accommodate their ways to the demands of the moment. They cannot forever continue successfully to rely on slogans out of the past. Before they rush hotly to the undoing, either in Congress or in the courts, of the major policies of the New Deal, they should take pause. Let them scrutinize these measures in the light of the ends which they are intended to accomplish, rather than condemn them out of hand because they restrict a selfish freedom.

Consider the Guffey Coal Act. The coal industry has been sick not only here, but in other countries as well, since a time well antedating the depression. Too much demand during the war, too little thereafter, and inflexibility of plant and personnel have created problems incapable of solution by ordinary means. No operators, acting either alone or in concert, no states relying solely on voluntary coöperation with their neighbors, have been able to carry out the necessary measures of stabilization, since they knew that the chief value of such measures would be lost through the independent action of those not participating.

Some comprehensive scheme was essential to bind all for their own good. Only the Federal government could sponsor and enforce such a scheme. And whether or not the law which has been enacted constitutes an ideal formulation of the need, at least it is almost universally recognized in the coal industry among owners and employees alike, that some such approach to the existent problem is essential. Of very much the same character are the crop regulation provisions of the AAA.

WILL these experiments and other similar ones be declared unconstitutional? I shall venture no prediction in so hazardous a field. It must be self-evident, however, that if they are struck down the demand will grow for constitutional amendment, if not,

¶ "THOSE *who sincerely hope for a continuation of capitalist society are above all the ones who should learn to accommodate their ways to the demands of the moment. They cannot forever continue successfully to rely on slogans out of the past.*"

indeed, for complete revision. Questions have already been raised as to the form such possible amendments might take. It has been pointed out that it would be very difficult for example, to formulate an amendment which might undo the Schechter decision without at the same time giving Congress much more power than is intended. Words have a queer way of being interpreted through time beyond the original expectation of their drafters. There has, in fact, been no really sweeping amendment made in our history. Rather have there been narrow piecemeal changes, although, of course, the Fourteenth Amendment with time grew heavily pregnant with new meaning.

Two of the amendments, and only two, were prompted by specific Supreme Court decisions—the Eleventh, preventing suits against states by private individuals, and the Sixteenth, which permits the Federal income tax. It took a very few years to accomplish the first of these changes, over a score to accomplish the second. A third, the Child Labor Amendment, remains unratified, although many years have passed since its submission.

It seems probable, therefore, that future amendments will be proposed singly in order to give Congress the right to enact those specific measures which the Supreme Court may rule to be beyond the present powers of that legislative body.

How far the changes at present proposed may go no one can foretell. Clear at least it is that some way, either of interpretation or amendment, will be found to enable organized society to exercise those controls which the majority believe to be essential. It should not be forgotten that the issue here is not merely between a strong central government and states' rights, as it has often been misrepresented to be. The opposition to laws of the kind here being considered has proven as great when they are proposed in the states as when they are suggested in Congress.

The theory that rights reserved to the states were impaired, for instance, by the NRA, fails to take into account the fact that effective regulation by single states is impossible, often because of the restrictions of the Federal system itself. So, for example, New York, in its attempt to regulate the milk industry, found itself thwarted when dealing with milk imported from other states. Barring agreement among all states concerned with the same problems, chaos is bound to result—and agreement on vital matters has not been possible over any wide area.

For this reason it has often been suggested that the problem might be solved, provisionally at least, by the introduction of new administrative units, regional areas, or the like, to have those powers which now seem to reside neither in the states nor in the Federal government. My own judgment is that such regional units should rather replace the states entirely for all but minor administrative purposes. Nevertheless it is doubtful whether this problem can receive adequate consideration outside of a new constitutional convention. Too many delicate questions of adjustment are involved.

In approaching the whole problem we must remember that the Constitu-

Regulation or Public Ownership?

"UNDERLYING all the objections to specific measures and overshadowing any interpretations of the Constitution which may be handed down by the Supreme Court in the near future is the question whether regulation will ever be sufficient. The pressure toward collectivization is bound to grow stronger and with increasing momentum, unless regulation proves itself much more successful in the future than it has proved in the past."

tion itself was designed to prevent the chaos which had resulted, under the Articles of Confederation, from the absence of compulsion upon the newly freed colonies. The written document, of course, limited the power of the central government to certain types of situations. But there can be no doubt that the purpose of the Fathers was to invest the central government with powers they deemed essential for the effective carrying out of the national interest. Changed conditions call for wider areas of compulsion.

THE way in which the Supreme Court has defined the powers enumerated in the Constitution may have rendered these inadequate to the present need. It is still too soon to be sure of this; the court has so frequently reversed its own earlier positions. The interpretations about to be rendered under some of the new laws, particularly under the Labor Relations Act and the Utilities Act, will probably indicate whether or not the existing document is adequate. Particular problems of the present need to be met by means properly adapted to desirable ends without the hampering effects of outworn preconceptions being allowed to interfere, whether these be of interstate commerce or due process.

How, in the light of this discussion, does the Wheeler-Rayburn Utilities Holding Act fare? Are there conditions which call for a remedy? Is it probable that the provisions of this law will help remove those conditions? Is action better taken by the Federal government than by the states? There can hardly be any reasonable difference of opinion on the first and last of these questions. That evils grew up during the predepression peri-

od, both in regard to the flotation of securities and the diversion of profits from operating to holding companies, can hardly be denied It is immaterial that the abuses may not have been general; the results were spectacular. Even Judge Coleman, in his recent opinion denouncing the new law, was constrained to admit the existence of abuses.

No student of the subject can fail to recognize also the relative impotence of the individual states. Yet even if this were not the fact, practical considerations would establish the desirability of Federal action in dealing with at least the larger units in the field. These units operate, if not nationally, then at least in so many different states as to make it preferable that all regulation should come from a single source. The advantage of Federal supervision over capitalization, stock sales, and general policies of these large holding companies should be beneficial not only to the public but to the companies themselves, very much as the Interstate Commerce Commission's supervision has proved beneficial to the railroads.

There remains, of course, much difference of opinion regarding the merits of the particular bill, especially with regard to that clause which permits the breaking up of holding companies that do not conform to the standards laid down.

This modified, so-called "death sentence" is probably the center of the opposition from the point of view of the companies. It is unfortunate that the issue has been so beclouded. It should be possible even for the companies so to present their case, if they really have a sound one, that it will appeal to sober opinion. It will not do for them to scream hysterically. And certainly their case will be harmed if they persist in refusing to abide by those provisions of the law about the merits of which there can be little disagreement.

An attempt altogether to prevent the Federal government from regulating the utilities will, in the end, make it more difficult for them to get a hearing on points about which they may possibly be right. Nor is it reasonable to suppose that the country will long permit its will to be thwarted once it becomes convinced that legislation such as is embodied in this bill is necessary.

The utilities might take an example from the attitude of the New York Stock Exchange. Instead of seeking a judicial contest of the constitutionality of the Securities Law and the Securities Exchange Law, the Stock Exchange has acquiesced in the enforcement of these laws and indeed coöperated with the Securities Exchange Commission in making the enforcement workable and reasonable. It is true, of course, that individuals who believe their rights to be infringed are likely to resort to the courts to have these rights established. Sometimes these individuals are properly praised for preserving liberty from governmental encroachment by raising fundamental constitutional issues. But there are certain liberties of which the country may have had too much. And industry, by rushing too often to the defense of these particular liberties while complacently ignoring the denial of many others, may find that

its very foundations will be swept away in the flood of resentment inevitably sure to come. History teaches that the day of reckoning can be no more than postponed and that the longer it is in the coming, the heavier will be the penalties exacted.

UNDERLYING all the objections to specific measures and overshadowing any interpretations of the Constitution which may be handed down by the Supreme Court in the near future is the question whether regulation will ever be sufficient. The pressure toward collectivization is bound to grow stronger and with increasing momentum, unless regulation proves itself much more successful in the future than it has proved in the past. And in the working out in the immediate future of this problem organized industry has a great responsibility, alike to itself and to the public. If its leaders fail to learn and exercise the necessary coöperation they will end by forfeiting such power and respect as still are theirs. Here is the true test of Americanism in business.

Can capitalist business continue with real regard for the interests of labor and the consumer? I do not think it can; nothing in our past history warrants faith in the success of its self-regulation. But surely it now becomes incumbent upon those who believe strongly in the future of American capitalism to make a fair and honest effort to understand and coöperate with the newer spirit increasingly abroad in the land.

What about the Other Utilities, Mr. Jones?

"TIME was during the last few decades when it was popular with the public and in legislative halls, to cuss the railroads and charge them with everything vicious. Some of this was justified, and while there will always be abuses and incompetency in the affairs of railroads, just as there will be in every other form of human activities, the attitude of the American people toward the railroads is changing.

"This changed attitude is characteristic of our people. They are always sympathetic toward the fellow in difficulty. Furthermore, we are beginning to realize that the railroads belong to the public—the policy holders in insurance companies, depositors in savings banks, et cetera.

"I hold no particular brief for the railroads, but they are entitled to a fair deal by the public, as well as by our legislators; also from their competitors in other forms of transportation."

—JESSE H. JONES,
Chairman, Reconstruction Finance Corporation.

Financial News and Comment

By OWEN ELY

Supreme Court TVA Decision Involves Billions of Dollars

Fears that continued TVA operation will mean huge losses to utility investors and will establish a precedent for government intervention in other lines of business were stressed in the appeal of Alabama Power Co. stockholders to the Supreme Court. Attorney General Jones of Vermont filed a brief declaring that his state did not favor projects such as the Passamaquoddy and the TVA, and two counties of Georgia joined with Vermont in resenting encroachment of the TVA.

The government continued to stress its new argument that power is an "inevitable by-product" of the passage of water over a dam, and must necessarily be generated immediately and distributed or else "lost forever." John Lord O'Brien of the Attorney General's office, when queried by Justice McReynolds, expressed the personal opinion that sale of electrical appliances by the government would be invalid but that sale of TVA power to municipalities on a wholesale basis is "entirely different." He contended that the Wilson dam and Muscle Shoals developments were undertaken at the insistence of Congress to improve navigation and for national defense purposes.

Regardless of the outcome of the present suit, utility interests feel strongly that the government can hardly sidestep its previous widely publicized "power yardstick" claims. Thousands of mimeographed speeches, press releases, etc., scattered throughout the land by the TVA propaganda machine, all bearing upon the yardstick idea and emphasizing the sale of power as the principal object of TVA, cannot be ignored by the courts as wholly inconsistent with the government's present argument that sale of power is merely incidental to such constitutional duties as improvement of navigation and national defense. The creation of the Electric Farm and Home Authority to finance the sale of electric appliances is certainly evidence that sale of power is a primary interest.

It can hardly be concluded that the government's present varied plans for financing utility developments, large and small—which it is estimated will eventually involve some $3,000,000,000 or nearly six times the cost of the Panama canal—is designed merely to further navigation and war-time defense.

It has been estimated that a billion dollars of utility property, or some 8 per cent of the entire investment in the country, is directly affected by the forthcoming decision. Not only may huge amounts of taxpayers' money be wasted in unnecessary duplication of power facilities by the government in certain regions, but utility companies in other sections may be barred from private financing to provide needed plant expansion because of the threat of further socialistic experiments and destruction of private equities by the government. Hardly any new private capital has gone

into expanding the industry since the government began its many-sided anti-utility program.

Justice Brandeis demanded from Forney Johnston, attorney for the Alabama Power Co. stockholders, evidence that stockholders had suffered "irreparable injury" to personal property rights and Mr. Johnston stated that 1,800 preferred stockholders owning $3,000,000 to $4,000,000 in stock have joined in the suit. According to the *New York Journal of Commerce,*

> Since the case came before the Supreme Court speculation has been rife that it may be thrown out on the ground that minority stockholders, all of whom are preferred shareholders of Alabama Power Co., who are attacking the TVA, cannot bring suit.

While it may be, therefore, that technicalities weaken the present case, the Supreme Court's decision, anticipated sometime in January, should in any event be of great aid to the utility industry in clarifying the broader issues involved.

Bus Transport Becoming Major Industry

THE rapid growth of the bus lines, which it is estimated carried more than 2,000,000,000 revenue passengers last year, has made rapid inroads upon the revenues of both steam railroads and local traction companies, many of which are affiliated with large utility systems. In New York city, busses substituted for street cars on Eighth and Ninth avenues, after being in operation only a month, showed a passenger gain of 70 per cent over the trolley income of November, 1934, and have even made some inroads on the Eighth avenue city-owned subway. Both the traction companies and the railroads have belatedly recognized the importance of the new industry, and the advantages it enjoys in frequency and mobility of service. The romance of Greyhound Corporation, which has enjoyed a sensational advance in the past two years (on the New York Curb and later on the New York Stock Exchange) has perhaps given the industry more publicity than any other incident.

Thus far the industry has been largely financed privately, but the day of mergers, flotations, etc., now seems to be approaching. Under new standards imposed by I.C.C. regulation, some of the "little fellows" (there are some 5,000 bus companies, it is estimated) may now find it expedient to combine, and refinance under banking sponsorship.

Utility Financing Awaits Clarification of SEC Policy

IN the absence of any definite understanding with the SEC with regard to the legal status of holding company bonds registered after December 1st, bankers have continued to mark time with respect to new offerings. The only two important issues in the fortnight ending December 21st were the $45,000,000 Southwestern Bell Telephone Co. first and refunding "B" 3½s due 1964, offered at 102½ by a syndicate headed by Morgan Stanley & Co., Inc.; and the twice-postponed Southwestern Gas & Electric Company offerings by a syndicate headed by Brown Harriman & Co., Inc., consisting of $16,000,000 first "B" 4s due 1960 at 99½ and $4,500,000 4 per cent "A" serial debentures due 1936–45 at various prices.

It is interesting to note the first appearance of an uneven maturity, the telephone bonds maturing in twenty-nine years, presumably to avoid congestion of financing in 1965 when so many other refunding issues put out in 1935 will fall due.

Both issues were well sold, the institutional demand for the telephone bonds at the low yield of 3.35 per cent being especially large. The threat of litigation which had overhung the Southwestern Gas & Electric offering apparently had little effect on absorption of the bonds. The SEC had "speeded up" its action on this issue, the commissioners

themselves hearing the arguments instead of assigning the case to an examiner. Possibly the fact that the parent company of the system, the reorganized Middle West Corporation, had dutifully registered as a holding company accounted for the special consideration given by the commission. The bond issues had been registered October 30th but offering had been twice postponed due to opposition by Halsey, Stuart & Co. over ramifications of the parent company's reorganization plan.

On December 10th, Brown Harriman & Co., Inc., and Whiting, Weeks & Knowles, Inc., offered at 99 $1,500,000 Lockhart Power Co. (of South Carolina) first 4½s of 1955.

Ohio Bell Telephone Co. on December 8th applied to the Ohio Public Utilities Commission for permission to sell $38,000,000 common stock at par to reimburse its own treasury for "uncapitalized expenditures." The company is a wholly owned subsidiary of the American Telephone and Telegraph Co. but its balance sheet does not indicate any present debt either to banks or to the parent company. The application is somewhat puzzling because the company is in no apparent need of substantial cash at this time, its debt to affiliates having been entirely liquidated. The only funded debt outstanding at the beginning of 1935 was $4,749,000 underlying bonds due in 1944, which were called July 1st. The normal procedure for the company in raising new funds would be to sell its stock to American Telegraph and Telephone Co. for cash, but there would seem to be no need for plant expansion of the amount indicated. According to the *New York Sun:*

> The explanation for the application to sell additional stock probably lies in the Ohio law which permits utility corporations to capitalize expenditures only if authorization is asked within five years of the time the new property is added. If the commission authorizes the stock applied for in the latest application, it will have validated $38,000,000 unissued stock. The company apparently is believed to be building up an authorization for use when new capital is needed for expansion. Of the $150,000,000 stock authorized for the company, $130,000,000 is issued.

International Telephone Improves Position

International Telephone & Telegraph Corporation and subsidiaries (excluding the Postal Telegraph & Cable System, now in bankruptcy) made a preliminary report for the nine months ended September 30th of 53 cents a share compared with 29 cents in the same period last year. In the quarter ended September 30th indicated earnings were 20 cents against 9 cents last year. Postal Telegraph & Cable Corporation for the nine months had a net loss of $1,442,176 compared with a loss of $1,051,280 for the same period last year. However, according to Dow Jones, Postal's domestic business has picked up in the past three months.

On a consolidated basis interest charges of both systems would have been earned 1.42 times for the first three quarters this year against 1.14 times in the nine months of 1934.

Release of International from the burden of carrying the Postal deficit has been reflected in the market price of its debentures, which in December reached the highest levels in several years.

International is still handicapped by foreign exchange problems in Europe and South America. At the end of 1934, nearly half of its total cash of over $33,000,000 was tied up in foreign currencies. At present it is said that some $12,000,000 or more is in Spanish banks and cannot be drawn out for transfer to this country. Restrictions in Germany and Roumania also cause some difficulty. However, despite this freezing of its foreign balances, the company has had no difficulty in meeting its fixed charges.

The company's worldwide manufacturing business in telephone equipment is said to be doing well and telephone operations in Spain, Argentine, and Cuba have enjoyed a good upturn. In Spain, during the first eleven months this year, 23,324 stations were gained

compared with 18,769 last year. Cuban Telephone Co., handicapped last year by political conditions in the island, is said to be showing steady improvement this year.

Alfred E. Smith has been appointed a trustee of Postal Telegraph but one of the company's officials will probably also be appointed as cotrustee to supervise actual operations.

As contrasted with the poor showing of Postal, Western Union has declared a dividend of $2 payable January 15th, the first since April, 1932; while it was declared "out of surplus," ten months' earnings were nearly twice the amount of the dividend.

Higher Costs Continue to Depress Traction Earnings

EARNINGS of New York traction companies continue to make a dismal showing, although gross revenues have "turned the corner." Brooklyn-Manhattan Transit System in its report for the five months ended November 30th reported only $1.76 a share against $2.12 in the corresponding period last year.

While the Interborough Rapid Transit Co. showed a gain of over 1,000,000 passengers (about 1¼ per cent) in November as compared with last year, the balance after fixed charges was smaller for both the subway and elevated divisions.

Third Avenue Railway Co., despite the great success of its substitution of busses for trolleys on part of its lines, was also more heavily in the red for the four months ended October 31st than last year.

Associated Gas Absorbs Eastern Insull System

THE Federal government has filed a tax lien against Associated Gas & Electric Co. at New York for $48,551,845, said to be the largest attachment ever entered in the second district. The lien represents the government's claim for corporation income taxes for the years 1929 to 1933, inclusive, and for excess profit taxes in 1933. If the case follows the usual course it will probably go to the board of tax appeals and perhaps later to the courts.

Despite its various legal difficulties the Associated Gas & Electric System is continuing to expand. It recently acquired from the Central Hanover Bank & Trust Co. through an exchange of securities all of the Bank's holdings of common stock of the Jersey Central Power & Light Co., representing about a one-third interest. It is also a large holder of National Public Service Corporation debentures, which have a claim against the remaining two thirds of the stock. Jersey Central Power & Light is an $86,000,000 corporation which formerly was part of the Insull empire. Its power system connects with the Associated's Staten Island Edison Corporation and also with other properties of the system, so that complete integration of these properties is now contemplated.

Financial Effects of Long Island Lighting Company's Rate Cuts

LONG Island Lighting Co., dominated by Ellis L. Phillips (through E. L. Phillips & Co., Empire Power Corporation, etc.) has been under a long siege of investigation by the Mack legislative committee. The committee's findings have from time to time been featured in newspaper headlines, as "choice" items in the financial history of Long Island Lighting and other New York utilities were disclosed in the hearings, and the usual charges regarding high salaries and special profits have been given a thorough airing. In this connection it is interesting to note that the efforts of John E. Mack (who hails from Dutchess county and is understood to be a friend of the President) apparently have not been wholly motivated by social idealism, as he is reported to have received $76,500 in fees for his work over a sixteen months' period (the 2-year inquiry has already cost taxpayers some $528,000). With funds running low

and considerable doubt regarding the securing of an additional appropriation, Mr. Mack has announced his desire to resign.

Long Island Lighting recently announced a voluntary cut in electric and gas rates representing an annual saving of $646,900 to customers. This reduction is said to be the fourth and largest since 1929. According to the company's announcement "The residential consumers of electricity in Nassau county use an average of 61 kilowatt hours per month at a yearly cost, under the new rate, of $48.12. The same amount of electricity, under the effective rate in January, 1929, would have cost the consumer $73.20. This is a reduction of 34 per cent."

The new rates are from 7 to 2 cents per kilowatt hour, with a minimum of $1; the writer's first monthly bill under the new rates, for 176 kilowatt hours, amounted to $8.62 or an average of about 4.9 cents per kilowatt hour. (A previous 1935 bill for 184 kilowatt hours was at the average of 5.7 cents per kilowatt hour.)

Evidently the public service commission regarded the cut effective November 4th as insufficient, for on December 19th a $1,225,000 rate cut was ordered, about double that made by the company.

THE recent price range of Long Island Lighting Company's stocks has not indicated any outstanding prosperity. Earnings on the common dropped from 98 cents in 1931 to 22 cents in 1934, and this year were 16 cents for the twelve months ended September. Common dividends have been omitted since February, 1933, although maintained on the preferred stocks. The 7 per cent preferred is currently quoted around 78, the common at 4. The loss of revenues based on the voluntary rate cut, equivalent to about $2.50 per share on the preferred issues, will practically eliminate the margin of safety for these dividends and leave little or no earnings for the common, except as increased kilowatt-hour sales are an offsetting factor. The reduction ordered by the commission would, of course, cut more deeply and jeopardize preferred dividends, since the company's cash position last December 31st was none too favorable, current assets being less than half the current liabilities, which included $8,726,413 bank loans (reduced from $15,002,886 during the year).

Position of United Gas Corporation

UNITED Gas Corporation was financed on a somewhat liberal stock basis in March, 1930, when it became part of the Electric Bond and Share group. Electric Power & Light Corporation, in which Electric Bond and Share Co. has a 58 per cent interest, in turn owns practically all of United Gas' second preferred stock, some 48 per cent of the common stock, and about three quarters of the warrants. There are now about $22 accumulated back dividends on the first preferred stock, and about $27 on the second preferred.

As the result of depression difficulties, and perhaps failure to carry through completely the original financial program, the company owes banks $21,250,000 due next July 20th, and $25,925,000 "due on demand" to Electric Bond and Share, according to last year's balance sheet. The back dividends on the two preferred stocks amount to about $33,000,000, making a total of over $80,000,000.

Obviously these conditions would seem to call for some corrective recapitalization at the proper time. The company has, however, an "ace up its sleeve" in the form of a one-third interest in the important Rodessa oil field in Caddo Parish, Louisiana. On November 19th, it was reported from Tulsa that the company's subsidiary, United Gas Public Service Co., would let a contract for ten test wells to be drilled immediately, most of them as offsets for present producers.

A few months ago this field was reported by gossip writers in the financial press to have the potentialities of anoth-

er East Texas field, although handicapped by the heavy expense of drilling wells to a depth of some 6,000 feet. More recently, it has been realized that this was doubtless an exaggeration, although the field is considered to have excellent possibilities. United Gas' first producing well was brought in last July, with a potential flow estimated at 20,000–25,000 barrels a day. A second well produced only gas, but the third one gave an estimated oil production of 50,000–60,000 barrels. Possibilities of the field, which covers an area of not over 18 square miles, can be better gauged when the other wells, now being rushed to completion, are brought in. An unfavorable point is that while the oil shows a high gravity, gasoline content in octane rating is low. However, since the greater part of the field is in Louisiana (a small part being in Texas) there may be an offsetting advantage in the relatively lax restrictions on oil flow.

LAST August it was reported that a recapitalization plan for United Gas was imminent, but now it seems likely that further development work in the Rodessa field will be awaited in order to appraise the value of this equity. Unless these results are disappointing, United Gas may eventually be able to sell its oil interests in Rodessa to some company or group of companies for a substantial amount which can be applied on bank debts and the Electric Bond and Share note. This would doubtless facilitate readjusting the back dividends on the preferred stocks.

Subsidiary companies are not very heavily bonded (about $19,000,000 in the hands of the public) and recent gains in earnings might permit issuance of additional bonds. United Gas Public Service Co., which is developing the Rodessa properties, now has outstanding $64,587,000 debenture 6s of 1952–3, entirely owned by United Gas Corporation and another system company, of which $42,500,000 are pledged as collateral for the United Gas bank loan of half that amount. Lack of information regarding the current earnings of the Public Service Co. makes it difficult to gauge the possibilities regarding any public offering of the debenture bonds. It seems likely that first lien or mortgage bonds, possibly with a conversion feature, might prove more suitable for a public offering, with subsequent retirement of the debentures as the bank loans are paid off.

The system earnings are now showing improvement. In the ten months ended October, $10.47 per share was earned on the first preferred stock compared with $9.28 a year ago. This presumably does not reflect, as yet, full returns from the Rodessa field.

THE first-preferred stock is now selling on the Curb around 77½, the range this year being 35–84; the common is at 2⅜ (range ⅛–4⅛). The low price of the common is explained by the large number of shares, 7,818,959 (there are also warrants to buy 4,867,982 shares at $33.33 per share). Even if it proves practicable to "cash in" on the Rodessa field, it may be necessary to issue new common stock in lieu of back dividends on the preferred stock, which would probably mean a very substantial reduction in the number of shares now held by common stockholders.

The decline in the common stock during the past month or so appears due to (1) lack of further favorable publicity regarding the Rodessa field, and (2) possibilities of legislation at the next session of Congress more specifically regulating natural gas companies. United Gas Corporation has made substantial progress in reducing the number of subsidiaries and consolidating properties, and its properties are geographically well integrated, but it remains to be seen whether such progress would prove fully satisfactory to the SEC with respect to Title I of the Utilities Act. The relationship with the Electric Bond and Share group is another problem. Regulation of retail distribution of natural gas (Title III) was eliminated from the Utilities Act as finally passed; but a renewed attempt to press such regulation may be made next year.

What Others Think

What Constitution Are We Talking About?

As these lines are written, the United States Supreme Court has taken much of the real New Deal legislation into the "maw of Justice" where it is now in the process of juristic digestion and from whence it will emanate some chilly Monday morning, either in the form of the law of the land or a statutory corpse. The Agricultural Adjustment Act, the Tennessee Valley Act, and the Bankhead Cotton Control Act are among the important cases now under advisement (which may possibly but not probably be decided before these words are off the press). In any event, it is quite likely that we shall know the fate of these three statutes before the end of the month of January. In addition, the Guffey Coal Act, the PWA housing activities, and the Securities Act are scheduled to come before the highest court for review and decision prior to the usual summer recess of the court. There is a faint possibility that the Wheeler-Rayburn Act, the Labor Relations Act, and some other New Deal legislation may be added to the list before the end of the term.

The power which this tribunal holds over the life and death of such important legislation necessarily projects it into the political spotlight for the first time in years. The court has not chosen for itself this prominent position. The rôle has been thrust upon it by the course of events.

Foreign writers and observers usually regard our Supreme Court as unique in political history; they feel that all or the greater portion of our citizenry are devout in their reverence for this, our highest authority under the law. This is probably true to a great extent, but there are many leading figures in American life who do not hesitate to disagree with the Supreme Court, even after it has spoken.

A CASE in point is that of General Hugh S. Johnson whose prior resignation alone saved him from having his beloved NRA shot out from under him by the court's decision in the Schechter Case. It may be recalled that when the news of that landmark decision became generally known, General Johnson was among the first to swear allegiance to the American woolsack. He stated then that the court's decision should be regarded as sacredly as the law "handed down from Mount Sinai." Within a few months, however, the general apparently felt differently about the matter.

In an address to the Indiana Bar Association, last September, General Johnson undertook to strike a keynote for those who still cherish the memory of the late lamented Blue Eagle. He quoted with glowing approval a passage from the public correspondence between publisher Roy Howard and President Roosevelt anent the breathing spell:

> Smoke out the sinister forces seeking to delude the public into believing that an orderly modernization of a system we want to preserve is revolution in disguise.

Ever since the full significance of the Schechter Case has been assimilated, this great issue between those who would stretch the Constitution to any limits determined by Congress to be within the "public welfare" and those who insist that the people themselves ought to make the choice through specific constitutional amendments clearly stands in the background of all the argument about the constitutionality of the AAA, TVA, Labor Act, Utility Act, and a host of other so-called reform legislation.

SOME understanding of the broad aspects of this general issue is, consequently, an excellent start for almost any discussion concerning the constitutionality of particular statutes now under review. General Johnson, for example, believes that in some strange manner the Supreme Court has gradually brought the Constitution to mean (in spirit as well as scope) something quite different from the meaning intended by the Founding Fathers. He stated:

> In all this clamor about the Constitution, let's give a thought to *what* Constitution we are talking about. Is it the document that was written in Philadelphia in the simplest language that ever flowed from the pen of man for such a purpose?
>
> Is it somebody's medley, made up of a selected and conflicting judicial language?
>
> In either case it would do no harm to go back to the language and the history of the original document, to find out what, during all their lives, was in the minds of the men who made it. What was said about it by men on the court who were closer to its meaning than we can possibly be today.
>
> Those may have been horse-and-buggy days, but it has always been a matter of wonder to me that the statesmen of those poor weak little thirteen colonies—a narrow fringe of civilization on the edge of a howling wilderness of continental extent—had always in their minds the making of a nation extending from sea to sea—a single country spread across a continent. They talked about and saw only one economic unit unhampered by state lines obstructing its free commerce and trade. They invented a national system, of which they dreamed in terms of continental arteries of transportation on land and water, extending from the Great Lakes to the Gulf of Mexico, and from the Atlantic to the Pacific.

THE general alleges that evidence of the theory that national problems of commercial regulation were properly subjects of "national law," is to be found in historical references to early statesmen (including George Washington, Andrew Jackson, Charles Pinckney) and early political situations (such as the French occupation of Mexico and the conspiracy of Aaron Burr), even early decisions of the court itself. He stated:

> The classic definitions of these matters are, of course, in Gibbons *v.* Ogden. So far as I know, nobody has ever contested or even qualified them. They said that commerce among the states means commerce intermingled with the state—not just the trading that reaches physically across the state lines.
>
> It has been frequently emphasized that they also said that it did not mean commerce between man and man strictly internal to a state—and so they did—but what is never emphasized, that they emphatically qualified that statement by adding the words, "which does *not* affect other states."
>
> The great Chief Justice did not say, "does not *directly* affect interstate commerce." He said that the Federal power *must* reach into the states *to govern that commerce between man and man which concerns more states than one or affects other states.*
>
> Now that seems to me to be also a simple rule that *should* settle the whole matter of such statutes as NRA. Is there, in employment in manufacture, a commerce between man and man within the several states but which *does* affect other states, and which *does* violently and sometimes destructively concern more states than one? If it does, is it not in its nature national? If it is national, is any court going to commit itself to the position of saying that the regulation of that national concern of first magnitude is beyond the power of either the state or nation—a no man's land reached by no system of laws?

General Johnson believes that the limitations on the power of Congress to act in matters pertaining to "national commerce" in the complete sense of the term were commenced in the late nineties when the court set about interpreting the Federal anti-trust acts.

GENERAL Johnson did not criticize the Schechter decision itself. Indeed he admitted, "I don't see how anybody can blame the court for the outcome of the Schechter Case." Instead he criticized the manner in which it was presented to the court. Nor does the general believe a constitutional amendment is necessary to undo the prohibitions implied in the Schechter Case against such Federal legislation as the NIRA. On this point, General Johnson concluded:

> Upon a proper showing, it is inconceivable that the court would deny to this nation a power shown requisite in every other nation under the sun—to regulate its national commerce nationally. That showing could be made in such a way as to make it clear that

the true touchstone is not whether a thing *directly* or *indirectly* affects commerce among the states. It is whether that thing substantially or insignificantly affects that commerce. . . .

There is no occasion for any change in the powers or personnel of the Supreme Court of the United States. It is only necessary to take there a proper case, properly presented, to get that court to underwrite and authorize the most obviously necessary doctrine of our present political economy—a forthright acknowledgment of John Marshall's simple truth, *"In commerce we are one people."*

The day after the Johnson address to the Indiana Bar Association, William L. Ransom, president of the American Bar Association, spoke to the same group. His address was somewhat in the nature of an answer to the general. He pointed out that, in his opinion, the question asked by General Johnson, "What Constitution are we talking about?" might more appropriately have been asked at the close of the Johnson address than in its title.

JUDGE Ransom saw no reason why a suggestion of specific amendment to the Constitution should not be considered fairly by lawyers or anyone else "provided the suggestion is specific and if made on its merits." Thereupon, Judge Ransom laid down three points on the question of constitutional amendments that "give proper concern to men of all parties and social faiths":

First, there is a proper desire that suggestions of constitutional change shall be made specific, so that their text and effects can be carefully studied; and there is impatience and anxiety when sweeping change is agitated without definition or text. In the nature of things, any proposal for constitutional change has to be very definitely and specifically formulated before it can be considered or put in the processes of submission to the states. So there is little reason for concern on that score.

Secondly, there is a concern that drastic change shall not be considered and acted upon except upon mature consideration and under full safeguards. It could not be otherwise, as to the time elements; the method of amendment, provided for in the Constitution itself, assures a period for full and most deliberate consideration by the states.

Thirdly, there is a concern that any proposals for sweeping changes shall not be acted upon except under conditions which permit and assure a reasoned and deliberate judgment of the people, uninfluenced by any considerations foreign to the best interests of the people as a whole. On the part of many citizens, there is an aversion to the submission of a constitutional amendment as a party measure, under the pressures of political exigency and patronage and the quest for partisan advantage. There have been instances, in the past, where ill-considered amendments were due to these influences, which appear to be inherent in the party system of government. It should be possible to offer and consider constitutional amendments on their merits, under no whip of parties or minorities, and with neither advocacy nor opposition made a partisan measure or maneuver. To offer an amendment as a party measure leads to the equally undesirable step of opposition as a party measure.

A NOTED commentator on constitutional law is Dr. Howard Lee McBain, professor of that subject at Columbia University. Dr. McBain is another writer who does not regard every letter of our Supreme Court division as being exactly in the nature of a law "from Mount Sinai." However, Dr. McBain has more recently adopted the rôle of judicial prognosticator. Writing in the *New York Times* magazine section, Dr. McBain runs lightly over the principal test cases before the court and the issues involved in each. He concludes with his forecast as to what the court, in his judgment, is likely to decide in each case. Here is the final result obtained by Dr. McBain:

To sum up this prospective review: If I were a politician worrying about the issue of the Constitution in the forthcoming campaign, I should be formulating my tentative plans against the Ides of next June upon the following assumptions:

First—That, in addition to the NRA and other New Deal laws already held void by the court, the Cotton Control Act and the Guffey-Snyder Coal Act will have met similar defeat.

Second—That, in addition to the Gold Clause Act already sustained, the AAA, the TVA, and the act permitting condemnation of property for housing projects will have been upheld.

Third—That the fate of a large number of acts, including the Securities Exchange, the Social Security, the new Railroad Retirement, the National Labor Relations, the Public Utility, and the Mortgage Moratorium acts, as well as the AAA amendments,

The Baltimore Sun

J'ACCUSE!

will still be hanging in the balance, though favorable or adverse decisions on these in lower courts will unquestionably exert considerable influence upon the public mind.

The Supreme Court is the ally of no political party. As a court it is neither friend nor foe of the New Deal. Its pronouncements at this term will probably demonstrate that fact to those who are already wishfully thinking otherwise.

DR. McBain did not venture to comment on the constitutional merits of the Wheeler-Rayburn Act but confined his remarks to the prophecy that the Supreme Court would not decide such an important question this term—particularly on such a strangely aligned case as that decided by Federal Judge

Coleman in Baltimore last November. On the question of the TVA, however, Dr. McBain is more specific. He stated:

> In my judgment there is scarcely any doubt that the Supreme Court will at this term sustain the constitutionality of the Tennessee Valley Authority. A case involving this question is already before the court.
>
> The Wilson dam at Muscle Shoals was begun as a war enterprise—to manufacture nitrate products. As such it was and is clearly within the war powers of Congress. As an improvement to the navigation of the Tennessee river it is also clearly within the commerce power of Congress. For both of these purposes electric power is indispensable; but the project produces a lot more power than the government needs for military and navigation uses.
>
> When the Norris, Wheeler, and Pickwick dams are completed and generators installed power production will be enormously increased; but no question concerning this increase is involved in the present case. It deals merely with the competence of the government to sell its surplus power to municipalities and other consumers and thus go into the power business—possibly, not to say probably, in competition with private producers of power, although no question of such competition is directly involved in this case.

THE writer believes that the court will uphold the TVA on the basis of its decision in 1930 sustaining the Boulder Canyon Project Act, wherein it was held that "the fact that other than navigation will also be served could not invalidate the exercise of the authority conferred." He added:

> As for the government's entering into competition with private industry, it may be noted that there is nothing especially anomalous or novel about this. The Parcels Post Act of 1912, for example, created nation-wide government competition with express companies. Nor can it be said that the framers who conferred the postal power upon Congress had in mind that it should include the ordinary business of a common carrier.
>
> Other instances might be cited. In the field of utilities, in particular, the court has more than once held that a municipality is not barred from competing with a local utility service unless the company can show that the municipality has agreed in unmistakable terms not to compete. Such utilities, says the court, act at their own risk in the matter of future municipal competition. Do not they also act at the risk of national competition in circumstances such as those of the Tennessee valley project?

The possibilities of almost indefinite expansion of congressional power under the general welfare clause is another long standing puzzle that will probably have to be decided by the court during the current term. This issue is squarely presented in the Louisville slum clearance case now before the court. The liberal viewpoint, so-called, was stated judicially by Judge Florence Allen, only woman on the Federal bench, in a recent dissenting opinion involving another PWA slum clearance project. Justifying the government's position, Judge Allen stated:

> At the time the Constitution was adopted this general welfare clause was understood to confer upon the Congress an independent and substantive power, ceded to it by the states, totally distinct from those conferred in the succeeding clause of Art. I, § 8 (Citing) 4 Jefferson's Correspondence 524; 4 Hamilton's Works (Lodge Ed.) 151; Monroe, Views of the Presidents of the United States on the Subject of Internal Improvements; 2 American State Papers, Miscellaneous, 443 and 446; Story on the Constitution (fifth edition) 913; Burdick on the Constitution, 77; and Willoughby on the United States Constitution, 269.

MORE recently, Chief Judge Phillips of the U. S. Circuit Court of Appeals, for the Tenth Circuit, construed the general welfare clause to justify Federal loan-grants to municipalities for the construction of electric power plants. These two opinions stirred the constitutional conscience of a young New Deal lawyer, John W. Hesler, who, in a recent newspaper article, outlined his reasons for doubting the validity of such a construction. He stated in part:

> Well, the sum total effect of the foregoing attack upon what I considered the settled meaning and significance of the general welfare clause was to put me to thinking as well as investigating. . . . In short, I argued that there would be but little, if anything, left of the Constitution. Then it was that I had the happy thought that it did not matter if there was an error committed by the copyist of the Constitution and that the one signed by the members of the convention was not the one intended, for that it was not the intention or purpose of the members

of the convention that would bind the court, but the document submitted to and adopted by the ratifying conventions, for the court could not assume that the state conventions would have ratified something that never was submitted to them.

Mr. Hesler quoted from the writings of James Madison, Alexander Hamilton, Thomas Jefferson, James Monroe, and Justice Story. Concerning the position of Jefferson and Hamilton, Mr. Hesler stated:

> Both Jefferson and Hamilton are in agreement as to the scope and significance of said clause, and it is respectfully submitted that when those two antagonists agree upon a controversial matter, it should remove any uncertainty with respect thereto.
>
> The interpretation placed upon this clause by these gentlemen was done within two years after the ratification of the Constitution, when the details and circumstances attending its proposal and adoption were fresh in the memories of those participating therein and the people generally. Thus it is seen that there is very little, if any, trustworthy data upon which to base the contention that it was intended or understood that the "general welfare clause" should be anything other than a qualification upon, or a limitation of, the power to tax.

As Walter Lippmann, noted political analyst, has more recently pointed out, it would be an exceedingly dangerous doctrine indeed to say that the Constitution supports any action deemed by any lawyers as being in the public good. One may as well have no Constitution at all, he argues. Even the personal guaranties in the Bill of Rights would be stripped of protection. It is easy enough to utter platitudinous intentions about the general welfare, but what government doesn't claim to be interested in the general welfare of its people. Messrs. Mussolini, Hitler, and Stalin could all camp very comfortably on such broad common ground. If this be the Constitution, what Constitution are we talking about anyway?

—F. X. W.

WHAT CONSTITUTION ARE WE TALKING ABOUT? Address by General Hugh S. Johnson delivered before the Indiana State Bar Association. September 6, 1935.

WHAT CONSTITUTION ARE YOU TALKING ABOUT? Remarks of William L. Ransom, president, American Bar Association, at annual luncheon of Indiana Bar Association. September 7, 1935.

TO THE SUPREME COURT: VITAL NEW DEAL ISSUES. By Howard Lee McBain. *The New York Times Magazine.* November 17, 1935.

NEW DEAL LAWYER QUESTIONS RULING FAVORING NEW DEAL. *The Evening Star.* September 22, 1935.

A Bibliography of the Constitution and the Supreme Court

WITH the importance of the United States Supreme Court looming ever larger as various New Deal measures come up for review during the current term, a number of books have made their appearance on the literary market to satisfy the demand of laymen, as well as lawyers, for information about the function of the court—its history and its relation to the Constitution and to the people. Probably the most readable and, for that reason, the most helpful to the layman of this series is "Congress or the Supreme Court"—"Which Shall Rule America?" by Egbert Ray Nichols of the University of Redlands. Professor Nichols has functioned in the capacity of an editor of this volume, which is in effect a series of important short articles on the subject. The thesis is stated in the form of a debate and the subject matter is divided pro and con. The subject matter is also classified as follows: History of Judicial Review; Reënacting Laws over the Supreme Court's Veto; The Right of the Supreme Court to Declare Laws Unconstitutional; The Record of the Court; The Supreme Court and Expansion of the Constitution; Con-

stitutions of Other Nations; The Supreme Court and Legislative Policy; The Supreme Court and the Distribution of Government Powers; The Supreme Court Politics; and some miscellaneous additional material.

Writings of some prominent personages are included in the collection; to wit: Franklin D. Roosevelt, Woodrow Wilson, Associate Justice Stone, the late Senator LaFollette, former Representative James M. Beck, and Professor Edward S. Corwin. Of course, all of the material is not of a uniform high level. Some of the text, such as, for example, an excerpt of a speech of Representative Monaghan (from the *Congressional Record*), seems not only superficial, but of doubtful validity in argument. On the whole, however, the book is a valuable assembly of contemporaneous or near-contemporaneous thought on the subject. A helpful addition is a bibliography including references to books and periodical contributions classified according to subject treatment in the volume itself. This reviewer missed a number of important references to some of the legal periodicals which do not appear to have been examined by Professor Nichols.

EARLIER in the year of 1935, but still comparatively fresh, was published a volume by Dr. Oliver P. Field, "The Effect of an Unconstitutional Statute." The best reason for the existence of this book is perhaps given by Dr. Field himself in his introduction:

> The effects of an unconstitutional statute may be numerous. Some of them are easily perceived; others are more difficult to identify. A decision holding a statute unconstitutional may have, and often does have, many nonlegal effects. Sometimes the legal effects are the more important, sometimes the nonlegal effects. Often both types of effects are of considerable significance.
>
> To one reform movement a decision holding a statute invalid is practically a death knell; to another it serves only to strengthen the cause and to result in an educational campaign to enlist public support for a constitutional or statutory change that is more effective than it could otherwise have been. To declare a statute invalid sometimes results in the practical ruination of the fiscal policy of a governmental area for a short time; at another time such a decision may result in serious study and subsequent action to correct weaknesses in the tax structure. A commercial policy of private business may be profoundly affected by the exercise of judicial review in a particular case. Judicial review may be effective in one case, and in another have virtually no subsequent effect upon even the work of the courts in that field.

It will be readily seen that Dr. Field has laid out for himself an exceedingly broad field. This is also borne out by the mere restatement of the chapter headings which include: The Status of a Private Corporation Organized under an Unconstitutional Statute; The Status of a Municipal Corporation Organized under an Unconstitutional Statute; The Effect of an Unconstitutional Statute in the Law of Public Officers: The Effect on Official Status; Liability of Public Officers for Action or Nonaction; Res Adjudicata, Stare Decisis, and Overruled Decisions in Constitutional Law; Reliance upon Decisions and the Effect of Overruling Decisions in Constitutional Law; Government Bonds and Private Promises under Unconstitutional Statutes; Mistakes of Law and Unconstitutional Statutes: Payments and Services; The Recovery of Unconstitutional Taxes; Amendatory, Validating, Curative, and Remedial Measures; Judicial Review As an Instrument of Government.

SO specialized and deep is the nature of this inquiry, it would be presumptuous for a reviewer who has merely read through the book to pass judgment upon the thoroughness of Dr. Field's research. As to those factors of which a reviewer with some background in the literature of the profession can intelligently judge, it would appear Dr. Field has laid out the subject with due regard to clarity, symmetry, and logic. Within these limits, it would also appear he has made a distinct contribution in a comparatively new field (at least the approach is comparatively new) of constitutional literature.

The Bismarck Tribune

THE BATTLE OF THE CENTURY?

Another interesting new book that should prove useful to those who desire more intimate knowledge of the court's function is "Historic Opinions of the United States Supreme Court." This is a collection of leading cases, edited and annotated by Ambrose Doskow who, according to the publisher, was at one time secretary to one of the justices of the court. In Mr. Doskow's collection, one may not only trace the evolution of the court, but also assimilate the atmosphere during the times at which the various opinions were rendered. The opinions are printed verbatim (with the exception of Munn *v.* Illinois). The book starts off with Marbury *v.* Madison (in which John Marshall first asserted the doctrine of judicial supremacy) and runs through the various landmark decisions, such as, the Dartmouth College Case; McCullough *v.* Maryland; the Dred Scott decision; Hammer *v.* Dagenhart; the Anti-trust Cases; even down to the Gold Clause Cases and Schechter Case. Of

course, individual opinions are likely to vary as to the importance of some of the cases included and some of those omitted. This reviewer, for example, missed Chisholm *v.* Georgia and Smyth *v.* Ames. However, within the limits of a single volume the exercise of editorial discretion in such matters is obviously necessary. In addition to the case text itself (which for the benefit of lay readers, will be found surprisingly clear and simple), Mr. Doskow's notes provide an enlightening setting of historical background for each case. One may at times get slightly impatient with Mr. Doskow's occasional insistence on his own conclusions as to the effect of various pronouncements of the court, some of which struck this reviewer as being quite unwarranted. However, it is easy enough to overlook the editor's personal opinions without losing the benefit of the excellent factual presentation.

—L. K.

CONGRESS OR THE SUPREME COURT. By Egbert Ray Nichols. Noble and Noble, New York City. 476 pages.

THE EFFECT OF AN UNCONSTITUTIONAL STATUTE. By Oliver P. Field. University of Minnesota Press, Minneapolis, Minn. 355 pages, $5.00.

HISTORIC OPINIONS OF THE UNITED STATES SUPREME COURT: Selected with a Preface and Introductory Notes by Ambrose Doskow. The Vanguard Press; $4.50.

An Anthology of Public Ownership

IN the issue of PUBLIC UTILITIES FORTNIGHTLY of January 2nd is an article by Rt. Rev. John A. Ryan, of the faculty of the Catholic University of America, outlining generally what are, in his opinion, the limits to which we, in the United States, ought to go on the matter of public ownership. Obviously, there must be some limit if we are not to go in for outright socialism which would surely not have the approval of Dr. Ryan. By coincidence, we happen to have available for review the proceedings of the Ninth Biennial Public Ownership Conference held in Washington, D. C., last February, but recently released. In this single volume are collected all (presumably) of the addresses sponsored by the Public Ownership League, and it is interesting to note the variety of undertakings which the league's speakers would have owned and operated by the Federal or local governments. Unquestionably, the public ownership movement has extended beyond the water-rail-power stage. Not that public ownership of electric utilities was neglected. Indeed it was still the center of the attack. However, we did note some new or at least little-known offensives for the public ownership movement in this country.

For example, Dr. Mark Millikin of the city council of Hamilton, Ohio (he was then, at any rate) claimed that his city was the first to establish a municipal gas plant to compete with a private utility in the United States. It also has municipally operated electric and water service. Municipalized transportation was defeated in 1933 to Dr. Millikin's regret, and he also hoped that hospitals would be regarded as public utilities and operated by municipalities. Benjamin C. Marsh, secretary of the People's Lobby of Washington, D. C., urged government ownership of housing facilities operated under a "government housing corporation." Bruce Bliven, associate editor of *The New Republic,* gave a brief but exceedingly interesting discussion on why the government should own and operate radio broadcasting.

IRVING B. Altman, representing the National Association for Credit Control, wants the Federal government to compete with private banks by expanding the Postal Savings system to include

pass books and checking accounts. United States Representative William Lemke of North Dakota went a step further and suggested a Bank of the United States along somewhat similar lines. The well-known monetary reformist, Robert Owen, urged managed currency in an address entitled "Sound Money." Former Senator Brookhart was on hand to demand that the government take over the railroads without delay, while Alfred S. Dale of North Dakota topped all socialistic suggestions by intimating that other states might well follow the example of his home state, North Dakota, which, it appears, owns and operates its own bank, bonding fund, fire and tornado insurance, hail insurance, grain mill, and grain elevator.

All of these enterprises were claimed by Mr. Dale to be successful and profitable in every way. This is not entirely in accord with the weight of evidence observed by this reviewer but that is neither here nor there. If there have been a few deficits or offers by the state to sell some of its enterprises, it was hardly the time or place to dwell on such matters.

Heretofore, these public ownership meetings have had a tendency to resemble Little Jack Horner conventions, wherein municipal plant operators strive to impress each other with the excellencies of their respective charges. There was still a good bit of that at the 1935 meeting, but there was also evidence that the league, under the guidance of Secretary Carl Thompson, is seeking new worlds to conquer. For example, the resolutions unanimously adopted (reported in full text) demanded complete government ownership of telephones, gas, and rural electrification. Students of government administration were also given something to think about by a resolution advocating the establishment of a Federal Department of Municipalities, to have rank in the President's Cabinet. The purpose would be to have the Federal government perform service directly for municipalities "similar to that which the Department of Commerce, the Labor Department, and Department of Agriculture render to those various elements of our American life." If and when such a department is installed, it will be another step toward short-circuiting the states in the relation between the municipalities and the Federal government. We have had much advancement in this direction since the Public Works Administration came into operation. The league's resolution seems to be another suggested peg in the coffin of states' rights.

On the whole, the volume was quite interesting as a comprehensive résumé of what the government ownership advocates are thinking and planning. It deserves careful consideration of regulatory officials, as well as privately owned utility operators. True, all of the addresses were not of a uniform quality of intelligence. This reviewer read through twice a short piece on "Education—the Basic Public Utility" without yet having the remotest idea of what in the world the good speaker was driving at; and there is another piece on the "Public Ownership Movement in Pennsylvania" which is a masterpiece of circumlocution and inconclusiveness. On the other hand, the paper by J. D. Ross, now a member of the Securities and Exchange Commission, on "How Long Is the Yardstick?" challenges the attention of any one seriously interested in public utilities or their regulation. The paper by P. J. Taylor on "Power Development on Federal Reclamation Projects" was also a valuable contribution.

—E. S. B.

PROCEEDINGS Ninth Biennial Public Ownership Conference. Washington, D. C. February 21–25, 1935. Bulletin No. 73. Price $2.00. Published by Public Ownership League of America, 127 N. Dearborn St., Chicago, Ill.

The March of Events

Asks Saner Utility Law

WENDELL L. Willkie, president of the Commonwealth and Southern Corporation, in an address before the Bond Club of New York last month, called for enactment by Congress of a "reasonable" public utility law "in place of the present destructive measures." Mr. Willkie said no single act would do more to restore the confidence of American business and to promote economic recovery than for Congress, in its January session, to replace the existing Public Utility Act with a reasonable measure. Mr. Willkie enumerated the milestones of attacks against the industry, saying there had been certain evils which needed correction, and asserted that in December, 1934, he tried to work out with Federal agencies a procedure for the solution of the question. This solution, he said, in his judgment would have met to the fullest extent the objectives of the Federal administration and still would have permitted the utilities to continue their development and play their part in bringing about economic recovery.

Signs Power Contracts

THE Ontario Hydro Commission last month approved two 10-year power contracts, one with the Gatineau Power Company and the other with the MacLaren Quebec Company. No arrangements had been made at that time with Beauharnois and Ottawa Valley companies but negotiations were said to be continuing with the latter.

Under the contract with Gatineau, the company reserves for the Ontario commission 260,000 horsepower at $1.75 per horsepower. The Hydro Commission, however, undertakes to take immediately 100,000 horsepower at $12.50 per horsepower and the balance when required. As soon as the full 260,000 horsepower is taken the reservation charge will disappear.

The agreement with the MacLaren Quebec Company covers a reservation of 60,000 horsepower at $1.75 per horsepower.

Federal Vacancies to Be Filled

ATTORNEY General Cummings on December 19th revealed that seven Federal judgeships open at that time would probably be filled "sometime early in the coming session of Congress."

"No progress has been made now on any of the positions," Cummings said.

Vacancies to be filled include the seventh circuit court of appeals (Illinois. Indiana, Wisconsin, and Michigan), the fifth circuit court of appeals (Texas, Louisiana, Mississippi, and Florida), and district judgeships in Virginia, Michigan, Ohio, and the eastern and southern districts of New York.

New Sunday Telephone Rate

THE American Telephone and Telegraph Company and the 24 associate companies of the Bell system on December 16th filed with the Federal Communications Commission new tariffs to take effect January 15, 1936. These schedules provide for reduced Sunday rates on interstate long-distance calls, and also for reduced rates on interstate long-distance person-to-person calls after 7 P. M.

There have been for a number of years discounts for long-distance calls by number from 7 P. M. to 4:30 A. M. It is now proposed to make all of Sunday a discount period. Under the new schedules, with minor exceptions, in any case where there is now a discount on number calls there will also be a discount on calls to a particular person. In addition, this discount will apply to all day Sunday.

Alabama

City Seeks Power Loan

THE Bessemer city council voted unanimously last month to accept an application, prepared by government agencies, for request of a loan for funds with which to construct an electric distributing plant, transmission lines, and substation, to be made by the city to the government. The council referred to the judiciary committee a resolution providing for additional legal services for conducting through the Federal courts the suits necessary to obtain the loan and build the plants and transmission lines. The fees to be paid attorneys will come from the amount designated by the government for legal services on the Works Progress Administration project.

New Electric Rate Reduction

FOR the second time in eight months, the Birmingham Electric Company recently announced a reduction in rates for residential consumers of electricity. The new arrangement, it was estimated, would mean a saving of $40,000 a year to residential consumers.

This saving comes about through the operation of what the company terms the "majority rule" feature of its rate plan. This feature is closely related to the "half-price electricity" provision of the plan, under which those who increase their consumption obtain the additional current at one half the regular rate. This half-price electricity has cost consumers an average of 1.37 cents per kilowatt hour, said to be the lowest rate in the U. S.

When the use of this cheap electricity reached the point where 50 per cent of the bills were for as much as 30 kilowatt hours, the "majority rule" feature became operative, and a half-cent reduction in the company's top rate was made. As the consumption continues to increase, the "majority rule" feature will bring about further reductions, until the objective rate is reached.

This reduction in the top rate was said to prove the soundness of the arrangement, serving the object which is most sought by all schools of thought on the power question—increasing the use of electricity for the benefit of the people, and lowering the cost of it as consumption is increased.

Arkansas

Gets Loan for New Water System

ALLOTMENT of a loan and grant of $7,074,500 to Little Rock for a new water system was announced December 22nd by Public Works Administrator Harold L. Ickes. The new system, which will be supplied from a source outside the city, will furnish the citizens with a much better quality of water than is now available. The allotment, made from the old appropriations for public works construction, was for 30 per cent of the cost of labor and materials used in construction. The loan will bear 4 per cent interest.

California

Municipal Power Rate Cut Planned

PLANS for municipal distribution of power prepared under the direction of the San Francisco utilities manager propose consumer rates 10 per cent lower than those in the new Pacific Gas and Electric Company schedules, it was learned late last month. Four alternate plans for putting the city in the power distribution business have been prepared for the local public utilities commission. Each proposal was set up on the basis of both revenue and general obligation bonds and each called for distribution of a part of the city's power in a particular section of the city. The private utility system in that section would be acquired so that there would be no rate competition.

Three of the proposed plans were requested by the supervisors—one calling for distribution of a part of Hetch Hetchy power, one calling for building a Red Mountain Bar plant and municipal distribution of that power, and a third calling for a combination of the two. The supervisors were reported to be on record as favoring revenue bond financing. Under San Francisco's charter, bonds cannot be issued except on a two-thirds vote of the people. A charter amendment could not become effective until 1937. The amounts of indebtedness involved in the prepared proposals were understood to call for outlays of from $10,000,000 to $15,000,000.

Approves Central Valleys Fund

SECRETARY Ickes announced December 10th approval by the President of a reallocation of $14,000,000 to the Bureau of Reclamation to start work on the Central Valleys projects in California. The reallocation followed rescission of $14,000,000 of the original allotment of $15,000,000. The withdrawal and reallocation of the money was made to permit the Reclamation Bureau to proceed with the construction of the project on a more feasible plan than originally proposed. A spokesman for the bureau said Comptroller-General McCarl had approved a revised set-up for the $167,000,000 project, which will permit simultaneous construction of all units.

Power Reduction Scheduled

RATE reductions, scheduled to go into effect February 1, 1936, were estimated to save Los Angeles consumers $1,627,000 a year, it

was announced last month by the board of water and power commissioners. The reduced rate was made possible when the board approved the recommendation of the plant manager. All regular bills rendered on or after February 1st, power officials said, will cover service rendered at the new rates back to the meter reading date of the preceding month.

Reductions included in the total represent a cut of 10 per cent in the anticipated gross annual revenues of approximately $16,350,000 for the fiscal year ending June 30, 1936. The total included a flat 10 per cent cut of $154,000 in street lighting service; a reduction of $446,000 per year for all classes of residential and domestic users of current, and a reduction of $1,007,000 a year for general lighting and power, including commercial, governmental, and industrial services.

Votes Down Power Plant

SUSANVILLE on December 6th voted down a proposed $75,000 bond issue for construction of a municipal power plant. A Federal grant of $45,000 for the same purpose was contingent upon approval of the bond issue.

Protests Phone Tax

THE right of California counties to tax corporation stocks and bonds was challenged by the Pacific Telephone and Telegraph Company in a protest accompanying its current tax payment to the county collector, it was revealed at San Francisco last month. Of its $750,000 payment, the company paid under protest a total of nearly $274,000. Besides challenging the securities levy, it charged the state board of equalization had overassessed certain of its properties.

The telephone company's contention the tax of two tenths of a cent on each $1 value of stocks and bonds is illegal was based upon two grounds. One was that the tax was to have been eliminated by the state income tax, the other that the state bank and corporation franchise tax has been paid in lieu of any other corporation taxes. The protest asserted that collection of the tax violates both the state and Federal Constitutions, notably guarantees against deprivation of property without due process of law.

It is anticipated that the protest will be followed by court action.

Connecticut

Reports Program of Rural Electrification

A PROPOSED program of rural electrification for Connecticut has been submitted to the Rural Electrification Administration in Washington by Miss Eleanor H. Little, state relief administrator. Together with Miss Little's recommendations went a survey by the Emergency Relief Administration disclosing 6,380 electrically unserved tenantable buildings in 87 rural communities of the state. On the basis of facts revealed by the survey, Miss Little recommends the formation of a state commission to "supervise and coördinate" the carrying out of a program calling for construction of 332 miles of proposed line extensions to serve 1,884 potential customers, with a density of 5 or more a mile and an annual revenue of $240 or more a mile.

It was also proposed that the extensions be constructed in whole or part by existing power companies, with the aid of Federal or state loans and the use of relief labor, or by consumers' coöperatives aided by such loans.

Miss Little recommends that, wherever necessary, Federal agencies should extend credit for the wiring of homes and barns, and the purchase of electrical household appliances and farm equipment; and that the rural electrification survey should be completed for the state and adjusted to include a study of highway lighting and traffic signals.

Illinois

Ordered to Reduce Rates

THE Illinois Commerce Commission December 12th ordered the Union Gas and Electric Company to reduce rates in Bloomington, Ill., by 3 to more than 10 per cent, effective January 1, 1936. This will amount to about $28,000 a year. On July 1, 1936, the rates will be further decreased by an amount equal to one third of any increase in the company's gross revenue, exclusive of space heating sales.

Indiana

Lights Turned Off

THE city of Huntington last month was without street lights and garbage cans were piled high with refuse because the municipal government was broke and could not pay its bills. Street lighting is done by the municipal plant which sent a bill to the city council for $1,712, but there was only 45 cents in the fund for payment. Mayor Bangs ordered that the lights be turned off until the bill is settled. The garbage collections were abandoned because the city was unable to buy fuel for the operation of the municipally owned incinerator.

The municipally owned light plant has been the center of a court fight for many months. The district is serviced electrically by the Northern Indiana Power Company, but the municipal plant has allowed residents to tap the street light lines and buy current at a rate lower than the company rate.

Iowa

Halts Municipal Plant Action

IOWA City officials December 14th were enjoined from any further proceedings toward erection of a municipal electric light plant when Federal District Judge Charles A. Dewey signed a temporary restraining order asked by the Iowa City Light & Power Company. The order restrained the Iowa City officials from entering into any agreement for a government loan or grant, from spending funds derived from such a source, and from issuing bonds for erection of a municipal electric plant.

A hearing on the order was set for December 30th by the court.

Kansas

Seeks Legal Precedent

ATTORNEY General Clarence V. Beck last month was seeking legal precedent to aid him in deciding whether the city of Chanute can legally accept a franchise to act as distributor of electrical current in the neighboring city of Earlton. The attorney general said there apparently are no state laws covering the point, and added that he had been unable to find legal precedents in Kansas or any other state.

Officials of Earlton recently gave Chanute a franchise to supply electric current and act as distributing agency. The attorney general said that if such action was legal, it would open up a statewide field to all municipal utilities.

It was said that no test case was planned and that the matter might be left to permit the legislature to amend the law either to permit the cities to serve other towns or specifically prohibit the practice.

Votes "No" on Bonds

CHERRYVALE voters recently rejected, 722 to 466, a proposed $31,000 bond issue for construction of a municipal power plant to supply current for street lighting and the city waterworks. The funds were to have been augmented by a $25,000 PWA grant.

Kentucky

Jurisdiction Challenged

THE Kentucky Public Service Commission on December 13th formally overruled the motion of the city of Louisville seeking discontinuance of the commission's inquiry into telephone rates charged in Kentucky by the Southern Bell Telephone & Telegraph Company. The order was made effective as of December 5th, when the commission overruled a similar oral motion made by the city through its special counsel.

The formal ruling was regarded as clearing the way for the city to take to the state courts its attack on the commission's jurisdiction.

The city's motion denied that the commission act of 1934 was constitutional and that the commission has jurisdiction over rates in the state or city. It expressly attacked the

commission's jurisdiction within the city of Louisville on the grounds such rates may be controlled only by the city.

Commissioners Ousted

ALL of the members of the public service commission on December 18th were ousted from office by an order of Governor Chandler, who recently took office following his election. The commission members were Lloyd Clark, chairman, William D. Cochran, and Francis M. Burke. The commission was created early in 1934 by a statute which empowers the governor to remove any commissioner "for cause, giving him a copy of the charges against him and an opportunity of being publicly heard in person or by counsel in his own defense upon not less than ten days' notice." From press reports, however, it would seem that the governor's action was taken under a so-called "ouster law" passed in 1934, which is of general application.

Massachusetts

Oppose Upward Revision of Rates

THE new schedule of rates proposed by the Boston Consolidated Gas Company, to become effective in January, 1936, would increase the cost to 220,800 consumers in the Greater Boston area and reduce the bills of only 19,200, Dr. John Bauer, New York utilities expert, claimed, as the city of Boston early last month concluded its evidence in opposition to an upward revision in rates and called upon the state public utilities commission to deny the company's petition. Dr. Bauer protested the proposed rates would place the heaviest burden upon the small consumers and would grant relief only to 8 per cent of the customers who are large consumers. Vigorous opposition from other quarters was also viewed as likely to make the commission consider the company's petition very carefully.

Michigan

Approves Rural Extensions

APPROXIMATELY $2,000,000 for line construction alone will be spent by the Consumers' Power Company during 1936 in a rural electrification program which will bring power service to 6,200 farms, schools, and business places, it was announced last month by Dan E. Karn, vice president and general manager. The announcement followed receipt by Karn of an order from the Michigan Public Utilities Commission approving a schedule of terms and conditions under which the extensions are to be made.

More than 60 per cent of the rural electrification program to be carried out in Michigan under a recent order of the commission will be done by the Consumers' Power Company, officials estimated.

Plans City Telephone Exchange

A COMMITTEE consisting of several city department heads was appointed last month by Mayor Couzens to investigate the desirability of installing a private city interdepartmental telephone exchange. The plan was suggested by Councilman Engel, who complained that the city's present telephone bills of about $200,000 a year are excessive. Mayor Couzens said he had rough estimates that a private exchange would cut present bills about $100,000 a year, "as about half our calls are interdepartmental."

Approves City Plant

BY a vote of 469 to 110, Zeeland on December 12th approved a proposal to erect a municipal power plant, with Federal aid, and to issue $20,000 in bonds. Residents held a public celebration after the vote was announced.

Demands Phone Rate Cut

PROFITS of the Michigan Bell Telephone Company can be cut $2,000,000 and still yield the required fair return on investment, the state informed the public utilities commission December 13th. The conclusion was reached in a brief on behalf of the state offered by the attorney general and one of his assistants. Filing of the brief was one of the last steps towards settlement of the telephone rate case that has been before the commission and the courts for nearly ten years.

The conclusion that the profits can be reduced was reached after an exhaustive study of the company's property and accounts. Many items set up by the company are con-

tested, such as the $3,000,000 included in the rate base for materials and supplies. The brief contends that an analysis of accounts of the company shows a requirement of only $1,250,000.

It was also argued that the company includes an item of $3,000,000 for taxes during construction of new plants, although the Michigan tax laws prohibit levies at such a time. Further, it was stated, the company's claimed value includes an item of $9,729,154 for interest during construction, "as against $1,836,265 actually experienced by the company and on its books."

Minnesota

Demand Power Rate Cut

INSTEAD of campaigning directly for a municipal power plant in next spring's municipal election, St. Paul Labor-Progressive forces will demand that the Northern States Power Company reduce its rates to the level which could be attained through a municipal plant, it was reported last month. The power plank drafted by the executive committee differs considerably from the proposal of two years ago, when Labor-Progressives campaigned for a bond issue to construct a municipal plant. It was said that the new plank merely would use the threat of municipal ownership as a club to force rate reductions. The rate reduction demanded was reported to be in the neighborhood of 25 per cent.

Missouri

Wants Powers Defined

DESPITE a recent agreement whereby the Panhandle-Eastern Pipe Line Company will furnish natural gas to the city of Fulton, the state public service commission still wants a ruling from the state supreme court on its regulatory powers over pipe-line companies.

Sam O. Hargus, chairman of the commission, said last month a request from the Panhandle Company to dismiss an appeal pending in the court on the commission's order directing the Panhandle-Eastern Pipe Line Company to furnish natural gas to the municipal distribution system at Fulton had been refused.

Montana

Board Refuses Reduced Rates

FOLLOWING hearings into electric rates in several Montana towns, a reduction in its electric rates in 26 eastern towns and cities that would net the customers savings of $80,000 a year, proffered by the Montana-Dakota Power Company, has been rejected by the board of railroad and public service commissioners.

Nebraska

Agreement Fails

REPRESENTATIVES of Nebraska's three public power districts last month discussed, but failed to agree, on a plan to unify their power distribution systems. Secretary Ickes seeks to create a model power distribution plan in the state around the projects, which will cost the Public Works Administration $56,000,000.

Out of the conference came a mere announcement that PWA officials would draft more detailed proposals for submission at a later conference.

PWA proposed to have $25,000,000 made available for Tri-County to build the Keystone reservoir across the North Platte river, regulating reservoirs and power plants in Jeffries and Johnson canyons and the major part of its irrigation works. The plan proposed to hold the Platte district to $3,200,000 for the Sutherland reservoir; North Platte regulating reservoir and power plant and the Loup district to $8,800,000 for its power production facilities. It proposed a $10,000,000 primary transmission system and a $4,000,000 secondary transmission system to link the hydroelectric plants and carry the power to potential markets. The cost would be allocated among the projects.

New York

Legislative Investigating Committee

JOHN E. Mack, counsel to the legislative committee investigating public utilities, was reported last month to have received $76,500 as his fee. This covers the sixteen months from July 1, 1934, when he began his work, to November 2, 1935. The average for the sixteen months was said to be a little more than $4,500 a month.

The committee started with an appropriation of $250,000, which was supplemented by an additional $300,000 last spring to carry the work through to the end of 1935. Because the funds are again running low, the committee was reported to be winding up its business and will report February 15th.

While some committee members were said to be considering asking an additional appropriation to carry on the committee's work for a third year, Mr. Mack was understood to oppose this, desiring to return to private law practice.

It was doubted in political circles that Governor Lehman could be persuaded to sign a measure carrying a third appropriation for the committee, since he was reluctant to sign the second appropriation last spring.

North Carolina

Rate Trial Ended

THE 7-week trial of the appeal of the Southern Bell Telephone & Telegraph Company from rate reductions ordered by the state utilities commission was ended in Raleigh December 12th. It was indicated that the trial would be resumed at another special term of court to be held in February.

During the trial the telephone company presented two issues. It contended the conclusions reached in the commission's reductions order, issued last December, were arrived at by improper methods and in disregard of evidence, and that it is therefore void, being violative of the "due process" clause of the Constitution. Secondly, the company contended that the rates fixed in the order would not yield a fair return on the company's investment and are, therefore, confiscatory and should be set aside.

The rate reductions are estimated to save the 78,000 customers of the Southern Bell in North Carolina approximately $321,000 annually.

The rate reductions were scheduled to go into effect last January 1st, but the order was stayed by a writ of supersedeas. If the court finally holds the rate cuts valid, however, the reductions will be as of January 1, 1935.

Ohio

City Power Plant Completed

THE opening of Hiram's new $36,000 city-owned power plant, December 14th, marked the successful end of a 10-year campaign for a municipal plant.

City officials say it is the first government-financed utility of its kind to be completed. The structure was made possible through Federal loans.

Consider Rent Charges on Utilities

PROPOSED city rental charges to public utilities for lines and poles in streets were revived and brought to the floor of the Cleveland city council December 10th, despite rulings that such charges are unconstitutional.

The ordinance was approved by the legislative committee; but the council later voted, 22 to 3, to refer the ordinance to the legislative committee on the plea of the law director that he wanted delay to amplify his opinion that the ordinance would be "unenforceable and invalid."

Under the ordinance, which would affect the East Ohio Gas Co. and the Cleveland Electric Illuminating Co. chiefly, the city would charge $2.50 annually for a pole, 5 cents a year for every lineal foot of ducts, conduits, mains, or pipes, and 5 cents a year for every lineal foot of 3-inch pipe. Telegraph and telephone companies are specifically exempted.

Power Dispute Causes Shut-off

ALL traffic lights in the town of New London were shut off December 10th because of a dispute between the New London Power Co. and the mayor and council, over failure of the company to collect from the city a bill of $3,380.

"No street lights will burn until the bill is paid," the company told the council.

The mayor replied: "They will never burn, then."

Oregon

Utility District Argument Heard

NEARLY 300 Linn county residents voted, December 6th, in favor of organizing a people's utility power district designed to permit utilization of power from Bonneville dam.

The vote was taken at the conclusion of a hearing conducted by the state hydroelectric commission. The opposition was led by a representative of the Oregon Business and Investors, Inc., who contended that the people's utility district law opens the way for excessive taxation.

Members of the hydroelectric commission announced a survey would be made for a report to Linn county sponsors of the power district within the next 120 days.

To Vote on Utility Tax Levy

THE Portland city council, December 11th, unanimously decided to submit to the voters at a special election January 31st the question of a $50,000 tax levy to finance valuation of the Northwest Electric Company with the idea of taking over the property of the company when its franchise expires in November, 1937.

Action was taken by the council following a statement by the company, through its vice president, that it would coöperate in every way to carry out the terms of the franchise, which gives the city the option to purchase; that it will extend the time in which action may be taken; that it will continue to operate under agreement with the city until the city can act; and will extend the option during the extra period of operation.

Utility District Attacked

DECLARING the people's utility district law was a "jumble and hodge-podge of petitions and errors," opponents of the proposed Marion county district last month attacked the legislative act from every angle, in a hearing before the state hydroelectric commission.

Proponents of the utility district, a preliminary petition for which had been filed with the commission, stressed the need for cheaper power, for more rural electrification, and cited various examples of successful municipal ownership projects as well as coöperative organizations to show the success of similar activities.

The people's utility district law, passed by the 1931 legislature and amended by the 1933 session, was not, it was declared by the opponents, "written by lawyers or by anyone who knew anything about legislation." Oregon lawyers now claim that it would be impossible to sell one bond under the act should the proposed district be created. Petitions signed by more than 2,000 citizens in protest against the district were presented at the hearing.

South Carolina

Rates Cut in Coast Sector

A NEW schedule of rates for customers of the South Carolina Power Company of Charleston, which will mean an annual saving of at least $173,000 to consumers, was announced December 18th by the state public service commission. Officials of the commission said the new schedule was voluntarily adopted by the utility after conferences with members of the commission and that, in view of its adoption, a schedule hearing before the commission on new rates had been canceled.

In addition to the immediate reduction of $173,000 a saving of approximately $109,000 would be made possible through the use of "objective" rates. It was explained that the objective rates would be available to consumers who increased their consumption of power by the addition of new appliances and other methods but that the immediate reductions would be available to all customers of the company.

B. J. Pearman, chairman of the public service commission, said that the greater part of the reduction was in electric rates and part was in gas rates.

Appeal in Power Case Expected

TESTIFYING before Federal Judge Watkins in the Greenwood county PWA loan-grant case, Administrator Harold L. Ickes told the court that PWA's sole interest in rates of the proposed $2,800,000 hydroelectric projects at Buzzard Roost is that of a bondholder. He declared that public plant charges must be high enough to insure repayment of

the Federal loan, but declined to reveal the PWA attitude toward electric power rates higher than enough to retire the debt.

Chief counsel for the Duke Power Company, responsible for the suit for injunction against construction of the project, contended that Buzzard Roost project would serve no Federal purpose and that, therefore, it was something for which the United States "cannot appropriate and levy taxes."

Tennessee

Suit Delayed

THE city of Chattanooga's suit attacking the franchise of the Tennessee Electric Power Company last month was ordered transferred to the U. S. district court. The utility's motion for the transfer was granted on the power company's plea that it was a nonresident corporation. Court attachés indicated the transfer would delay action on the suit several months.

The suit was originally designed to expedite the city's entrance into municipal distribution business with TVA power.

Proposes Utilities Institute

CHAIRMAN Arthur E. Morgan, of the Tennessee Valley Authority, last month proposed organization of a "national public ownership institute" to work toward greater efficiency in the administration of publicly owned utilities.

Power Firm Opposes Sale

IT was reported last month that the Memphis Power & Light Company has decided against selling its distribution facilities to the city of Memphis for handling Tennessee Valley Authority power. Instead, it was said that the company would offer an alternative plan whereby the utility would distribute TVA power with a surcharge of 10 to 15 per cent above the regular TVA rates. If the city does not accept the company's alternative plan, it was understood the utility would let the city build its own plant and then compete with it and the TVA power, for which the city of Memphis recently signed a 20-year contract.

Offers Power to Farmers

REBELLION against the TVA among west Tennessee towns which already have their own municipal distribution systems grew more serious last month as Union City offered to furnish electricity from its plant to farmers in surrounding territory, providing they build and maintain the distribution lines to the city limits. The offer was extended to the farmers through Mayor Miles, staunch opponent of the proposed TVA power hookup of west Tennessee towns.

An additional incentive for citizens of the town to oppose the plan was the prospect of a 20 per cent reduction in electric rates. City commissioners last month were studying the suggested decrease and if adopted, it would become effective January 20th.

Texas

Lower Gas Rates for Panhandle

THE West Texas Gas Company, serving consumers in forty-three northwest Texas towns, last month advised the state commission that it would put into effect reduced rates recently ordered by the commission. The company expressed the belief that the new rates would not give it sufficient revenue to meet its obligations, but indicated that it would give "the rate a fair trial."

Defeats Power Bonds

WICHITA Falls, at a special election held December 11th, defeated a proposed $1,260,000 bond issue for the construction of a municipal light and power plant to be built with PWA funds, by a vote of 1,584 to 964. A proposed loan of $1,260,000 from the Public Works Administration was to have been accompanied by a 30 per cent outright grant amounting to $490,000.

Gas Wastage Order Issued

AFTER extended hearings in November, the state railroad commission, December 10th, issued a new order regulating the production of natural gas in Texas. The order became effective at once and was to continue through December, with the possibility of being readopted for January.

It was drafted with the intention of withstanding court attacks which made the first order under the state's new conservation law virtually inoperative.

Under the new order, production was al-

located on a basis of 50 per cent acreage and 50 per cent potential, as in the previous order. Two zones for prorating Panhandle sweet gas were retained.

Federal Labor Board Aide Sued

IN a unique action, the El Paso Electric Company last month demanded $10,000 damages from Dr. Edwin A. Elliott, labor board representative, blaming him for a strike of its employees last February. The claim, filed in United States District Court, described Elliott, regional director of the Labor Relations Board, as the "proximate cause" of a walkout of operating employees of the company which caused a shutdown of light and power facilities in several Texas and New Mexico communities. The shutdown, the company asserted, cost it $10,000.

Dr. Elliott denied he aided in fomenting the strike.

Virginia

Against Two-man Street Car Plan

FROM the standpoints of cost and safety, President Jack G. Holtzclaw, of the Virginia Electric and Power Company, recently expressed doubt as to the wisdom of a proposed ordinance requiring the power company to maintain two men on every street car and bus operated in Richmond.

The ordinance, if approved by the city council, will entail a heavy outlay on the part of the power company which would have to employ between 500 and 1,000 additional bus drivers and street car operators to maintain two men on each vehicle during every shift, it is said.

Washington

City Plans Purchase

FURTHER reports on Seattle's survey toward possible purchase of the Puget Sound Power & Light Company system were submitted last month to the city council. The depreciated value of the power company's properties in western Washington and at Rock Island was placed at $97,095,531.94, against a "book value" of $118,435,388.83 set by the company. This new data were prepared under the direction of City Lighting Superintendent J. D. Ross. Ross is asking the purchase by City Light of all the companies properties in Seattle and King's county, and its White River plant in Pierce county. These represent nearly half of the entire system. Other public ownership advocates, who are working as county groups, are sponsoring similar campaigns for public acquisition and operation of units of the system in their respective districts.

Wisconsin

Seek Own Light Lines

AT the request of a group of Richland county farmers, the public service commission recently postponed consideration of the Wisconsin Power and Light Co.'s petition to add about 23 miles to its lines in that county.

The farmers said they were investigating the possibility of building their own lines, financed through Rural Electrification Administration, with which they have already been in contact.

Through the recent filing of articles of incorporation for the Oakdale Coöperative Co., to furnish farm electricity, Monroe county farmers have been first to organize to take advantage of Federal aid for rural electrification.

New Regulatory Procedure

A NEW method of taking technical testimony was to be tried by the state public service commission in two utility hearings to be held last month, to determine what saving in time, expense, and effort can be made thereby. Both the Wisconsin Public Service Company and the Interstate Light and Power Company consented to experiments with the new procedure in hearings involving their rates so far as accounting testimony by the commission staff was concerned.

Instead of commission accountants testifying at a public hearing, they would write out their testimony and have it notarized. Copies of the testimony would then be sent interested parties.

The Latest Utility Rulings

Property Transfers Approved in Order to Eliminate Holding Company

THE Missouri commission approved the transfer to The Gas Service Company of properties, assets, and franchises of its subsidiaries in furtherance of the intention of the holding company to become owner and operator and to cease to be a holding company.

The company is a holding company within the meaning of the Federal Public Utility Act of 1935. The proposed changes were made "to conform more fully with the requirements of that act."

Authority was also granted to The Gas Service Company to transfer more than 10 per cent of the capital stock of the Kansas City Gas Company to the Cities Service Company. This was also in furtherance of the objective of eliminating the holding company status. Acquisition of the physical properties was not possible at the time as part of the capital stock was owned by interests not affiliated or associated with The Gas Service Company.

The commission ruled that it could not grant a certificate of convenience and necessity to The Gas Service Company to transact the business of a public utility in those cities where its subsidiaries were operating. On this point the commission said:

> Having granted certificates for the construction of those properties, or those properties having been committed to the service of the public as public utilities prior to 1913, the succeeding owner is obligated to continue the operation until released by this commission. Therefore, it follows that the purchaser, The Gas Service Company, now seeking authority to purchase, own, maintain, and operate the gas distribution systems, succeeds to the rights and obligations of the preceding owners. The application for a certificate of convenience and necessity, as we understand the Public Service Commission Law, is the application to be made by any proposed owner or operator for the commission to find that the public convenience and necessity requires the construction of the plant and its operation. When once found, the conditions under which such finding could be had cannot be used as a basis for finding that a gas plant shall be constructed when in fact it is already constructed and in operation under the original finding. The only section in our statutes empowering the commission to grant a certificate of convenience and necessity is § 5193 of the 1929 Revised Statutes, § 72 of the original act, and is for the initial construction of the system.

Re The Gas Service Co. et al. (*Cases Nos. 9059, 9060, 9065*).

Delay Deprives Stockholders of Exchange Rights

ABOUT a year ago the Pennsylvania commission approved the issuance by the Metropolitan Edison Company of prior preferred stock in exchange for a like number of shares of cumulative preferred stock. The approval order, as later amended, required exchanges of stock to be made on or before April 30, 1935. Stockholders who failed to make the exchange prior to that date have been denied the right to exchange.

The commission, in authorizing the new stock issue, provided that two notices should be sent to stockholders, the second notice to be sent by registered mail. Several stockholders, who, through neglect or oversight of the notices, had failed to make the exchange, requested that the commission direct the company to exchange at a later date. This the commission refused to do except in the case of a

person who had purchased her stock too late to receive the registered mail notice and who, furthermore, had mailed her request to the company for exchange of shares on the last day of the exchange period. Her request for exchange was deemed proper.

The commission in August and September did authorize, but did not require, the company to make the exchange for the tardy stockholders. The company requested that these orders be rescinded, since, in the opinion of the company, the exercise of the permission thus granted would be inadvisable from the point of view of its relationships with its other preferred stockholders. The commission was of the opinion that the company should not be required to effect this exchange for the holders who failed to comply with the order of the commission on or before April 30th. *Re Metropolitan Edison Co.* (*Securities Docket No. 58*).

Notes to Pay Salaries Disapproved

THE Oregon Commissioner of Public Utilities disapproved an application by a telephone company for approval of the issuance of promissory notes in payment of salaries of officers for administrative services, where he was not convinced that the amounts in question, "particularly in view of the method or lack of method at which the compensation was arrived at," were reasonable. The commissioner, in commenting on the company's proposal, said in part:

> The practice of issuing notes, stocks, and other securities in payment of operating charges is a dangerous one from the point of view of the company. It has been condemned by at least two state commissions having statutes similar to ours. In *Re* Sanford (Cal. 1930) P.U.R.1931B, 108; *Re* Richmond L. & R. Co. (N. Y.) P.U.R. 1917D, 807; *Re* Mill Valley & Mt. T. Scenic R. Co. (1912) 1 Cal. R. C. R. 422. In the instant case no particular harm would result from the approval of these notes as they are amply secured by the fixed assets of the company. To approve the same would, however, establish a precedent contrary to good practice.

Re Waldport Telephone Co. (*U–F–693, P.U.C. Oregon Order No. 3054*).

Contract with Labor Union Has No Bearing on Service Obligation

AUTHORITY was granted to the Chicago, Burlington & Quincy Railroad Company by the Missouri commission to change a railroad station from an open agency to a prepaid station with custodian in charge, over objections by a representative of the Order of Railroad Telegraphers, who insisted that such a change could not be made in view of contracts between the railroad and the union.

The commission declared that it was not in a position to pass upon the contractual relations between the Order of Railroad Telegraphers and the railroad company. The offer of the railroad company of certain services and the requirement of the commission that certain services be rendered by the custodian and the acceptance by the railroad company of the commission's orders, it was said, presupposes the company's compliance with the order. If it should become necessary for the railroad company to alter its contracts in order to comply with the commission's order, that, said the commission, is the problem of the company. *Re Chicago, Burlington & Quincy Railroad Co.* (*Case No. 8997*).

Going Value of Overbuilt Plant

THE Arizona commission, in making an allowance for going concern value, refused to view such value as an element which rises and falls with each change in the varied fortunes of a utility company. Consideration was given, however, to the fact that there had been a recession in business from the maximum reached when mining was at its height in the community. The commission announced its views on this subject as follows:

> The physical property was built to take care of these maximum conditions and if going value is to be assumed as a percentage of the value of the physical property (a view in which we do not wholly concur, but the only one before us as evidence in this case) then it seems obvious that the cost of acquiring the present reduced volume of business will be less as a percentage of a physical property built to meet the condition of maximum business development than would be required to have converted the property from a static condition to that of its maximum prosperity.

Re Arizona Edison Co. (Docket No. 6036–E–504, Decision No. 8209).

Certificate from Commission Not Required for Municipal Light Plant

THE supreme court of Arkansas held that a city was not required to obtain a certificate of convenience and necessity from the state commission before it could proceed to build a municipal light plant. It was ruled that the section requiring utility operators to obtain authorization from the commission did not apply to municipalities. The court, in explaining its ruling in favor of the city, said:

> Once its capital investment is repaid it does not have to earn except to make extensions and improvements and to meet obsolescence and decay. So long as people are capable of self-government, they would not find it necessary to appeal to a utility commission for aid in the operation of municipal utility. Such utility is local, the problems are local. We accord to every community the ability, the right, and authority to initiate, operate, and manage all local concerns, without interference from outside agencies, wholly disinterested and possessing no understanding of conditions.

Kitchens v. City of Paragould.

Contract and Common Carriers Classified under New Connecticut Law

THE Connecticut commission, in passing on applications for permits to operate motor carrier service, discussed the purpose and application of the newly enacted statute governing permits for motor carrier operation. The statute contemplates two types of permits, one for motor common carriers, and the other for motor contract carriers.

The commission held that a carrier accepting for transportation property of all kinds from all persons who desired the service to the extent of the applicant's facilities, at uniform rates for all similar service, and reserving no right arbitrarily to refuse to transport any property offered, was a motor common carrier.

On the other hand, a carrier not operating over any fixed route or routes, who did not solicit business generally and did no advertising, was held to be a private contract carrier where service was rendered to manufacturers whom he had undertaken to serve at charges based on a schedule of rates which applied to all who employed his services. While the carrier was always ready to consider extending his service to other

manufacturers as opportunity might offer, he reserved the right of selection at all times. The commission said, however:

> As in the case of common carriers no precise set of facts can be stated as decision of whether a particular person is entitled to a permit as a motor contract carrier or not. Though special contracts are the essence of such a business the bare fact that each undertaking to carry property is made the subject of a contract is not conclusive of the question. On the contrary such a procedure might well afford a means of granting special favors in direct violation of the duties incident to the public employment of a common carrier. No more can the issue be determined from the unsupported statements of the carrier. The question must be settled by an examination of all the facts relating to the carrier's business, *viz.*: the number of persons served, the nature of the service rendered, the character of property transported, and similar details.

Similarly, a carrier engaged in the business of dump trucking, under all the facts of the case, was held to be engaged in contract carrier service rather than common carrier service. *Re Bailey* (*Docket No. 6228*); *Re Sanford* (*Docket No. 6235*); *Re Karlson* (*Docket No. 6238*).

Lease of Certificate for Profit is Disapproved

AN application for permission to lease a certificate of public convenience and necessity for motor bus operation was denied by the New York commission, with the following statement concerning leases:

> The leasing for profit of a certificate of public convenience and necessity which the state has granted gratuitously to the lessor, is not, generally, in the public interest. When such a lease is in the public interest, the proper basis for the rental price is the lessor's reasonable and necessary expenses and disbursements in obtaining the certificate. Further, the commission cannot approve a lease which provides, at some future date, for the determination of a rental based upon earnings.

Re John Fabia (*Case No. 1875*).

Assured Supply of Gas a Requisite to Line Construction

THE Michigan commission denied authority to incorporate a corporation, to issue securities, and to extend a natural gas pipe line, on the ground that the feasibility of the project was not shown. The commission said:

> Act 9 of 1929 appears to indicate that before this commission should issue a certificate of public convenience and necessity for the construction of natural gas lines, those proposing to construct them should first have a financial basis which would enable them to carry out their enterprise, and secondly, that such persons should have under their control a sufficient supply of natural gas to serve the locality they propose to serve for a reasonable length of time, and thirdly, that they should be in a position to market gas in the locality they propose to serve.

Re Doughty, et al. (*D–2844, D–2843*).

Other Important Rulings

THE New York commission refused to order a natural gas extension to serve a village where, after giving the village the benefit of the doubt as to construction costs and consumption, it was found that the company could not earn more than 2 per cent on the additional investment even without any return on the company's general investment in production, transmission, and